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Supreme Court of the United States

October Term, 1977.

No. 77-508

GTE SYLVANIA, INCORPORATED,
RCA CORPORATION,
THE MAGNAVOX COMPANY,
ZENITH RADIO CORPORATION,
MOTOROLA, INC.,
WARWICK ELECTRONICS, INC.,
AERONUTRONIC FORD CORPORATION,
MATSUSHITA ELECTRIC CORPORATION OF AMERICA,
SHARP ELECTRONIC CORPORATION,
TOSHIBA-AMERICA, INC.,
GENERAL ELECTRIC COMPANY,
ADMIRAL CORPORATION,

Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
PUBLIC CITIZEN'S HEALTH RESEARCH GROUP,
CONSUMER PRODUCT SAFETY COMMISSION,
RICHARD O. SIMPSON,
BARBARA H. FRANKLIN,
LAWRENCE KUSHNER,
CONSTANCE NEWMAN,
R. DAVID PITTLE,
SADYE DUNN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 5, 1977.

OPINIONS BELOW.

The opinion of the Court of Appeals (1a-16a)[1] and the orders denying rehearing (71a-73a) and rehearing en banc (74a) are not yet reported. The opinion of the United States District Court for the District of Columbia (75a-86a) is reported at 400 F. Supp. 848 (D. D. C. 1975).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 5, 1977. Timely petitions for rehearing were denied on August 25, 1977, and this petition for certiorari is being filed within 90 days of that date. On September 9, 1977, the Court of Appeals granted a stay of its mandate to and including October 3, 1977 pending the filing of petitions for certiorari.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). Jurisdiction in the District Court was based on the Freedom of Information Act, 5 U. S. C. § 552.

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1. ("a") denotes a reference to the Appendix to this Petition which is being submitted under separate cover because of its length.

QUESTIONS PRESENTED.

The decision of which review is sought arises out of an action instituted in the United States District Court for the District of Columbia under the Freedom of Information Act, 5 U. S. C. § 552 ("FOIA"), to compel a governmental agency to release certain information which the agency wishes to release and has determined and agreed to release but which it has refrained from releasing solely because it has been restrained and preliminarily enjoined from doing so in separate litigation previously instituted against it in the United States District Court for the District of Delaware by the suppliers of the information. The questions presented are:

1. Does an FOIA action to compel release of information present the constitutionally required "case" or "controversy" where the plaintiffs and the governmental agency against which the action is brought desire precisely the same result, namely release to the plaintiffs of the information which the plaintiffs seek, and where the defendant agency has not released the information solely because it has been restrained and preliminarily enjoined from doing so in on-going litigation in another federal court?

a. Under the foregoing circumstances may a court of appeals circumvent the case or controversy requirement by perceiving a supposed disagreement between the parties as to whether the outstanding preliminary injunction of a district court in another circuit prohibiting the agency from releasing the information precludes the agency from providing the information to the plaintiffs?

b. Under the foregoing circumstances may a court of appeals create a justiciable case or controversy by making a *sua sponte* determination that the defendant agency does not actually desire to release the information because, in the view of the court of appeals,—a view based on rank speculation without foundation in the record, without hearing or argument, and contrary to fact—the agency had been less than vigilant in espousing its asserted position in favor of disclosure in the litigation in the other federal court?

2. Is a court of appeals free to require a district court in its own circuit to proceed to determine whether an agency should be compelled to release certain information under the FOIA when a district court in another circuit has preliminarily enjoined the agency from releasing the information, when a final determination of the matter in the other district court is imminent, and when the parties seeking the information have had and continue to have ample opportunity to intervene or otherwise participate in the proceedings in the other district court?

3. Under the circumstances described in the second question, is the court of appeals free to deprive the district court in its own circuit of the inherent discretion to stay the proceedings before it pending resolution of the proceedings in the other district court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Section 2 of Article III of the United States Constitution provides in relevant part as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State;— between Citizens of different States . . ."

The Freedom of Information Act, 5 U. S. C. § 552, provides in relevant part as follows:

> "(a)(3) . . . each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> . . .
>
> "(a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. . . ."

STATEMENT.

This petition seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit (opinion by Wright, J. for a panel consisting of himself and Bazelon, C. J. and Robinson, J.) reversing the dismissal for lack of a justiciable case or controversy of an action brought under the Freedom of Information Act ("FOIA") to compel a governmental agency to release certain information. The United States District Court for the District of Columbia ("the District of Columbia Court") (opinion by Richey, J.) had dismissed the action on the ground that there was no genuine dispute between the plaintiffs and the governmental agency since both parties desired precisely the same result—*i.e.*, release of the information—and the only reason the agency had not released the information was because of outstanding orders entered in separate litigation instituted against the agency by the suppliers of the information restraining and enjoining it from releasing the information.

The reversal of this decision by the Court of Appeals flies in the face of cases in which this Court has refused to permit the maintenance of suits where, in the words of one recent case, the parties "desire precisely the same result." **Moore v. Charlotte-Mecklenburg Board of Education,** 402 U. S. 47, 48 (1971). The Court of Appeals attempted to circumvent these cases by perceiving a supposed disagreement between the plaintiffs and the agency as to whether the orders restraining and enjoining the agency from releasing the information precluded the agency from providing the information to the plaintiffs. The Court also challenged the sincerity of the agency's asserted desire to release the information the plaintiffs sought and determined, without the benefit of hearing or argument, that the agency had been "less than vigilant" in

espousing the "pro-disclosure" position in the other litigation, which was proceeding in the United States District Court for the District of Delaware ("the Delaware Court"). These rulings of the Court of Appeals clearly do violence to the case or controversy requirement in the United States Constitution as it has been interpreted by this Court and, if allowed to stand, will open the door to precisely the type of contrived lawsuits which the case or controversy requirement was designed to prevent.

Also of critical importance to this Court are the questions raised by the Court of Appeals' insistence that the District of Columbia Court proceed with a prompt ruling on the merits of the case notwithstanding the preliminary injunction entered by the Delaware Court and the imminence of a final determination by that Court as to whether the injunction should be made permanent. In its original opinion the Court of Appeals justified this action by determining *sua sponte* first, that the Delaware litigation had been abandoned or terminated and that the preliminary injunction was "dead" and second, that the injunction could not be given preemptive effect because the pro-disclosure position had not been adequately represented in the Delaware Court, since no private party requesting the information had participated in the proceedings in that Court and in the Court of Appeals' view the agency had not fought sufficiently hard against entry of the injunction. Although the parties who participated in the Delaware litigation advised the Court of Appeals in petitions for rehearing that its views of the status of that litigation and the manner in which the litigation was conducted were completely erroneous, the Court of Appeals nevertheless continued blithely to ignore the preliminary injunction and on-going proceedings in the Delaware Court and deliberately set the District of Columbia Court on a collision course with the Delaware Court. Such behavior represents a sharp departure from the usual and accepted conduct of one federal court when confronted with an outstanding injunction on the merits issued by another federal court on the very same subject matter and should not be countenanced by this Court.

This proceeding concerns certain "television-related" accident information which petitioners, twelve manufacturers of television receivers, furnished to the Consumer Product Safety Commission ("the CPSC") in 1974 in response to special orders and subpoenas issued by the CPSC. Upon being advised in April of 1975 that, notwithstanding petitioners' claims of confidentiality of their submissions, the CPSC had made a final determination to release the information to the public, petitioners immediately brought suit in various federal judicial districts against the CPSC to enjoin the threatened disclosure on the grounds that release was barred by exemptions to the FOIA (5 U. S. C. § 552(b)) and by provisions of the Consumer Product Safety Act (15 U. S. C. § 2055) and the Criminal Code (18 U. S. C. § 1905). Most of the actions were commenced in the District of Delaware and, at the request of the CPSC, the actions filed in other districts were transferred to the District of Delaware.[2]

Temporary restraining orders prohibiting disclosure of the information *pendente lite* were entered shortly after commencement of the actions instituted by petitioners.

2. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (C. A. No. 75-104), RCA (C. A. No. 75-108), Magnavox (C. A. No. 75-112), Zenith (C. A. No. 75-113), Motorola (C. A. No. 75-114), Warwick (C. A. No. 75-115), and Aeronutronic Ford (C. A. No. 75-116). Matsushita (C. A. No. 75-2040), Sharp (C. A. No. 75-2049) and Toshiba (C. A. No. 75-2050) filed actions in the Southern District of New York, General Electric (75-CV-189) in the Northern District of New York, and Admiral (C. A. No. 75-531) in the Western District of Pennsylvania.

Then, on October 23, 1975, after extensive briefing and argument, a preliminary injunction (124a-126a) was entered by Chief Judge Latchum of the Delaware Court enjoining the CPSC from disclosing the information "in any manner" pending further order of the Court. **GTE Sylvania, Inc., et al. v. Consumer Product Safety Commission,** 404 F. Supp. 352 (D. Del. 1975) (87a-123a). On the basis of the extensive factual record before him, Judge Latchum held that the manufacturers had made a substantial showing that Section 6(b) of the Consumer Product Safety Act, 15 U. S. C. § 2055(b),[3] prohibited disclosure of the information since the CPSC had failed to take reasonable steps to assure the accuracy of the information and because it appeared that the information would not assist consumers in evaluating the relative safety of television sets—the avowed reason for disclosure given by the CPSC and one of the purposes of the Consumer Product Safety Act—and would in fact be misleading to the public.

Subsequent to the commencement of the actions brought by petitioners and the entry of temporary restraining orders in those actions, Consumers Union of the United States, Inc. and Public Citizen's Health Research Group (collectively "plaintiffs") instituted the instant action in the District of Columbia.[4] In this action plaintiffs sought

3. This provision reads in relevant part:

". . . The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identify of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances, and reasonably related to effectuating the purposes of this [Act] . . . ."

4. Plaintiffs chose to institute their own action in the District of Columbia Court rather than to intervene in the on-going proceedings in the Delaware Court (131a n. 9), even though they were fully aware of those proceedings and their complaint made specific reference to those proceedings.

under the FOIA to compel the CPSC, its Chairman, its other Commissioners, and its Secretary ("the CPSC defendants") to release the accident information which had been submitted to the CPSC by the manufacturers and which was the subject of the proceedings in the Delaware Court.[5] While agreeing with plaintiffs that the data should be released to them, the CPSC defendants had refrained from releasing the information because of the restraining orders entered in the Delaware litigation. Jurisdiction of the District of Columbia Court was invoked under the FOIA, 5 U. S. C. § 552.[6]

The defendants immediately moved to dismiss or stay the District of Columbia action on the grounds that (1) since plaintiffs and the CPSC defendants were in agreement that the information should be released to plaintiffs, the parties were not true adversaries and, accordingly, the constitutionally required case or controversy did not exist, and (2) even if there were a case or controversy the existence of the restraining orders entered by the Delaware Court and the on-going injunctive proceedings there called for the District of Columbia Court to exercise its discretion to stay the action pending resolution of the Delaware litigation. In ruling on these motions, Judge Richey of the District of Columbia Court held that there was no case or controversy and dismissed the action without considering the second argument advanced by the

5. The petitioning manufacturers were joined as defendants in the District of Columbia action, but no relief was sought against them.

6. Plaintiffs also asserted as jurisdictional bases for their suit the Declaratory Judgment Act, 28 U. S. C. §§ 2201-2202, and the Administrative Procedure Act ("APA"), 5 U. S. C. § 702. Clearly these statutes provide no independent basis for jurisdiction. **Skelly Oil Co. v. Phillips Petroleum Co.,** 339 U. S. 667, 671-672 (1950); **Califano v. Sanders,** 430 U. S. 99, 104-107 (1977).

defendants.[7] **Consumers Union of United States, Inc. v. Consumer Product Safety Commission, et al.**, 400 F. Supp. 348 (D. D. C. 1975) (75a-86a).[8]

The Court of Appeals reversed, holding that there was a case or controversy and that on remand Judge Richey should proceed promptly to determine "quite simply, whether or not the documents should in fact be disclosed" (15a). **Consumers Union of United States, Inc., et al. v. Consumer Product Safety Commission, et al.**, No. 75-2059 (D. C. Cir. July 5, 1977) (1a-16a). The Court of Appeals perceived the necessary case or controversy to exist in (1) a supposed disagreement between plaintiffs and the CPSC over whether the oustanding preliminary injunction entered by Chief Judge Latchum "unequivocally preclude[d]" the CPSC from providing plaintiffs with the information in question (9a) and (2) the Court of Appeals' suspicion that the CPSC did not really want to release the information because, in the Court's view, the CPSC's conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [plaintiffs'] argument that the requested documents should be disclosed" (10a). The Court of Appeals then brushed aside the preexisting Delaware proceedings and Chief Judge Latchum's preliminary injunction by cavalierly concluding that the Delaware litigation had "run its course" and had in effect been terminated (13a) and that the preliminary injunction was "dead"

7. The Court of Appeals in its per curiam opinion denying rehearing twice incorrectly referred to the manufacturers as "intervenors" (72a). In fact, the manufacturers were named as defendants in the District of Columbia action. Judge Richey dismissed the action as to the manufacturer defendants on the ground that no relief was or could be sought against these defendants under the FOIA or the APA (83a).

8. Even after the District of Columbia case was dismissed, plaintiffs made no effort to intervene or participate in any way in the proceedings in the Delaware Court, despite numerous opportunities to do so (133a).

(14a).[9] The Court further held that the injunction could not be given preemptive effect in any event because no private party requesting disclosure of the information had participated in the Delaware proceedings and, given what the Court viewed as the CPSC's "peculiar approach to [those] proceedings, therefore, the pro-disclosure position [had been] all but unrepresented" (12a).

This disdainful treatment of the Delaware proceedings stemmed from the Court of Appeals' erroneous impression of matters not of record and not argued in the briefs of the parties. All of the defendants in the District of Columbia action, including the CPSC, filed strong petitions for rehearing, pointing out that the preliminary injunction entered by Chief Judge Latchum was crystal clear[10] and that there was no dispute between plaintiffs

9. The asserted basis for this statement was that the Delaware District Court had entered an order (127a) "closing out" the case, an order which indicated to the Court of Appeals "that, although the reverse FOIA action was not dismissed in form, it was dismissed in fact, and by acquiescence of the parties the matter was dropped" (14a).

10. The injunction provided in pertinent part as follows (124a):

"On the basis of findings of fact and conclusions of law set forth in the Court's opinion of this date entered in these cases, it is

"ORDERED

"1. That pending final hearing and determination by the Court or until further order of the Court, the defendant, Consumer Product Safety Commission ('Commission'), its members, agents, officers, employees and all other persons in active concert and participation with them are hereby enjoined from disclosing to the public in any manner:

"(a) Any data submitted by plaintiffs to the defendant Commission in response to a special order issued May 13, 1974;

"(b) Any data submitted by plaintiffs to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

"(c) Any report, extraction, computer analysis, or other document or documents purporting to be a summary

and the CPSC over whether it precluded the CPSC from providing plaintiffs with the information they requested, that the CPSC had vehemently and in good faith advocated in the Delaware proceedings that the information should be released, that the Delaware cases and injunction were not "dead" but were very much alive,[11] and that in fact

10. (Cont'd.)
or compilation of the data previously supplied to the Commission described in sub-paragraphs (a) and (b) above. . . ."

11. On this point, the petitions for rehearing noted that by its terms the Delaware preliminary injunction was to remain in effect "until further order of the Court" (124a) and fully spelled out the history of the "close-out" order upon which the Court of Appeals placed its principal reliance (13a-14a). On August 2, 1976, Chief Judge Latchum advised the parties by letter that unless they intended to request a hearing for permanent injunctive relief, he intended to close the Delaware cases *for statistical purposes only*. The manufacturers responded to Judge Latchum by letters stating that they had no objection to the cases being closed for statistical purposes provided that it was understood by all concerned that the preliminary injunction remained in effect. The CPSC, on the other hand, requested that the cases be maintained as pending cases, advising Judge Latchum that it intended "to resist the entry of permanent injunctive relief." The CPSC did, however, request that further discovery and a further hearing be postponed until a decision issued in a case pending in the Western District of New York, which the CPSC thought might ultimately resolve issues pertinent to the Delaware cases (48a).

Judge Latchum then issued a "minute order" (127a) on August 20, 1976 instructing the clerk "to submit a JS-6 form to the Administrative Office and close these cases for statistical purposes." The minute order provided:

> "Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered."

It was clear to all of the parties in the Delaware cases that the preliminary injunction remained in effect even after entry of the minute order and it was equally clear to Judge Latchum. Indeed, at a conference held on July 11, 1977, Judge Latchum specifically stated that the minute order "didn't dispose of the case" and "didn't dismiss the action" and that "the preliminary injunction . . . remains outstanding" (49a).

Judge Latchum had set the matter down for a prompt hearing to determine whether the preliminary injunction should be made permanent (29a-65a). Plaintiffs not only did not dispute these facts but conceded in their response to the petitions for rehearing that the Court of Appeals' remand order should be modified to give Judge Richey discretion to proceed in some manner other than on the merits (69a-70a).

The Court of Appeals nevertheless denied the petitions for rehearing on August 25, 1977 (71a), refusing even to modify the remand order to give the District of Columbia Court discretion to consider a stay of its proceedings pending resolution of the Delaware litigation and making plain its determination to ride roughshod over the on-going Delaware proceedings.[12]

12. Since the denial of rehearing by the Court of Appeals, the Delaware litigation has continued past the discovery and pretrial motion stages to the point where it is now ripe for disposition on the merits. The CPSC's motion to transfer the Delaware cases to the District of Columbia was denied on September 15, 1977, at which time a briefing schedule on cross-motions for summary judgment was ordered by Chief Judge Latchum. **GTE Sylvania, Inc., et al. v. Consumer Product Safety Commission,** No. 75-104 (D. Del. Sept. 15, 1977) (128a-137a). Argument on these motions will be heard on October 28, 1977.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals raises important questions concerning an issue basic to every lawsuit instituted in a federal district court—that is, the existence of the constitutionally requisite case or controversy between the parties—and other fundamental questions concerning the relationship between the various courts comprising our federal system and the deference one federal court should accord a preliminary injunction and on-going proceedings of another federal court. These questions are presented in the context of a case in which plaintiffs seek to have a federal district court direct a governmental agency to release certain information which the agency has been preliminarily enjoined from releasing by a federal district court in another circuit in litigation instituted by the persons who supplied the information to the agency. The questions are highly significant and in view of the growing volume of FOIA litigation throughout the country are very likely to recur. Review of these important questions by this Court is needed in order that district courts may have guidance for the problems which will soon confront them.

The decision of the Court of Appeals for the District of Columbia Circuit in this case does violence to the case or controversy requirement of Article III of the Constitution by contriving a disagreement between the parties over the meaning of a crystal clear injunction issued by a district court in another circuit and by unfairly and inaccurately impugning the motives and integrity of the CPSC and the government attorneys representing it. It will unnecessarily expose the defendants to duplicative litigation and foment conflict between the District of Columbia Court and the Delaware Court by requiring the former to redetermine what the latter has already preliminarily determined and is in the process of finally determining. Indeed, by asserting, contrary to all reason, that the District of Columbia Court not only may but *must* proceed to hear the merits of the case instituted by plaintiffs, the Court of Appeals has attempted to usurp the jurisdiction of the Delaware Court—a court in another circuit over which it does not have any power of appellate review—over an on-going litigation on the same subject in which plaintiffs have consistently refused to participate.

We believe the decision of the Court of Appeals raises issues of paramount importance to the orderly administration of justice and the harmonious interrelationship of one federal court with another that cry out for review and direction by this Court. The errors of the Court of Appeals are so egregious even as to justify summary reversal. Such action would in itself provide significant guidance to the lower federal courts.

1. It cannot be doubted that as a court established pursuant to Article III of the Constitution, the District of Columbia Court has jurisdiction only over actual "cases" and "controversies." *See* **United Public Workers v. Mitchell,** 330 U. S. 75, 89 (1947); **Aetna Life Insurance Co. v. Haworth,** 300 U. S. 227 (1937); **Muskrat v. United States,** 219 U. S. 346, 356 (1911). There must be a "substantial controversy, between parties having adverse legal interests." **Maryland Casualty Co. v. Pacific Coal & Oil Co.,** 312 U. S. 270, 273 (1941). In the words of this Court's most recent case in the area, where parties "desire precisely the same result. . . . [t]here is . . . no case or controversy within the meaning of Article III of the Constitution." **Moore v. Charlotte-Mecklenburg Board of Education,** 402 U. S. 47, 48 (1971).

In the instant case, the Court of Appeals held that a justiciable case or controversy exists between plaintiffs, who seek release of certain information under the FOIA,

and the CPSC, the governmental agency from whom release is sought, notwithstanding the fact that the CPSC wants to release the information to plaintiffs and has made a formal determination to do so. The CPSC desires—and has always desired—precisely the same result as plaintiffs, and the only reason the information has not been released to plaintiffs is because of the restraining orders and the preliminary injunction entered in the Delaware litigation.[13] Thus on its face the decision of the Court of Appeals does violence to the constitutional case or controversy requirement.[14]

If the decision of the Court of Appeals is allowed to stand, any party which has been enjoined from doing something it wishes to do by one federal court will be able to try to be released from the injunction by arranging for another interested party to bring suit in a different federal court to have the first party ordered to do what it actually desires but cannot do without violating the injunction issued in the first court. The decision will also enable any individual who does not like a particular court's order in a litigation in which he has an interest to ignore that order and to try to bypass the order by starting an action in

13. Indeed, as Judge Richey noted in dismissing the District of Columbia action (82a n. 14), the CPSC made this very representation in the District of Columbia Court, stating in paragraph 13 of its answer to the complaint that "disclosure will be made as soon as the [CPSC] defendants are not enjoined from doing so."

14. As the District of Columbia Court correctly held (83a-84a) in dismissing this action, the inclusion of the suppliers of the information (the petitioning manufacturers) as parties defendant in the District of Columbia case does not serve to create a case or controversy. The complaint did not seek any relief from the suppliers and the only relief permissible under the FOIA or the APA, the claimed jurisdictional bases of this action, is relief against governmental agencies. *See* 5 U. S. C. § 552(a)(4)(B); **Lombardo v. Handler,** 397 F. Supp. 792, 802 (D. D. C. 1975), *aff'd,* 546 F. 2d 1043 (D. C. Cir. 1976); 5 U. S. C. § 702; **Thomas v. DeVilbiss,** 408 F. Supp. 1357, 1360 (D. Ariz. 1973).

another court he considers to be more favorably disposed to his position. The decision of the Court of Appeals thus will have a wide-ranging effect on litigation in the federal courts which cannot be reconciled with the language or intent of Article III. Moreover, as we discuss below, the justifications offered by the Court of Appeals for its case or controversy holding demonstrate such specious reasoning and lack of regard for the Delaware Court that the decision will set a dangerous precedent which other courts may be tempted to follow absent review and correction of the decision by this Court.

a. The Court of Appeals attempted to distinguish the cases which would ordinarily require dismissal here by contriving a disagreement between plaintiffs and the CPSC defendants as to whether the Delaware preliminary injunction "precluded" or "absolved" the CPSC from providing plaintiffs with the information they sought (9a). But not one word in plaintiffs' complaint or briefs questioned the meaning of the orders entered in the Delaware litigation or their binding effect on the CPSC. There was no controversy as to whether the restraining orders or the preliminary injunction prevented the CPSC from releasing the accident information to plaintiffs. Clearly they did.[15]

Indeed, the remand order (15a) itself demonstrates the speciousness of the alleged "controversy" between the parties found by the Court of Appeals. The remand order does not direct the District of Columbia Court to determine whether the Delaware injunction prevents the CPSC from releasing the information to plaintiffs, but rather mandates that Court to resolve the underlying merits of the case before it, to determine whether the information should be released to plaintiffs, and, in effect, to determine whether the Delaware injunction should have issued at all.

15. See note 10 *supra* for the language of the injunction.

There is concededly no disagreement between plaintiffs and the CPSC as to the answer to the question which the District of Columbia Court is directed to resolve. They agree that the information should be released, that disclosure is called for under the FOIA and that disclosure is not barred by any of the exemptions to the FOIA or the provisions of the Consumer Product Safety Act or the Criminal Code. The Court of Appeals' circumvention of the case or controversy requirement in this manner could not be clearer and cannot be allowed to stand.

b. Equally disturbing and without precedent is the Court of Appeals' unwarranted impugning of the motives of the CPSC and its defense of the Delaware cases as exemplified by the Court's statement that the CPSC's conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [plaintiffs'] argument that the requested documents should be disclosed" (10a). This virtual accusation of bad faith on the part of the CPSC and its attorneys by the Court of Appeals was made without the benefit of briefs or oral argument on the subject and was based on inferences which, in addition to having no basis in the record, are clearly wrong, as demonstrated by Chief Judge Latchum's recent opinion describing the Delaware cases as "hotly contested" (128a).[16]

16. The petitions for rehearing filed with the Court of Appeals, particularly that of the CPSC, show how totally unjustified the Court of Appeals was in its attack on the CPSC's handling of the Delaware litigation. Of particular note is the Court of Appeals' completely baseless challenge of the CPSC's motives in failing to oppose the temporary restraining orders and its decision to withdraw its appeal from the preliminary injunction. The need for TRO's to prevent the whole matter from becoming moot was so obvious that the entry of such orders by the Delaware Court was certain, and therefore opposition would have plainly been fruitless. Moreover, the CPSC felt it needed more time fully to brief its position before any preliminary injunction hearing (62a n. 12). The decision to withdraw the interlocutory appeal was made by the

Moreover, the Court of Appeals' extraordinary reaching beyond matters of record to find a justiciable controversy here was completely out of keeping with its role as a court of appellate rather than original jurisdiction. As the Court apparently recognized in some small part (11a n. 27), questionable or even clearly incorrect civil litigation strategy is simply not a matter for consideration by an appellate court. The self-admitted desire of the CPSC defendants to release the accident information to plaintiffs absent the Delaware injunction is itself sufficient to demonstrate a lack of adverseness between the parties. Even if the Court of Appeals believed that the CPSC's conduct of the Delaware litigation somehow brought into question the sincerity of its stated desire to release the information to plaintiffs, it was clearly inappropriate and in excess of the Court's authority to base its holding upon that belief—thus going far beyond the mere taking of judicial notice of proceedings and positions taken by the parties in other litigation—without affording the parties an opportunity to be heard in a federal district court with the power to hold a hearing on this limited question.

2. By ordering the District of Columbia Court to proceed to determine whether the accident information should be disclosed, the Court of Appeals completely disregarded the outstanding preliminary injunction issued by the Delaware Court prohibiting disclosure of the in-

16. (Cont'd.)
Solicitor General, who concluded that the appeal would clearly be futile (63a). Nor is the failure of the CPSC to press for a prompt final hearing in the Delaware litigation any basis for challenging the bona fides of its expressed desire to release the information. The fact is that the CPSC justifiably concluded that prompt final hearing would simply result in the Delaware injunction being made final and that it stood a better chance of prevailing if a hoped-for favorable ruling in a case pending in the Western District of New York were handed down first (64a).

formation and the imminence of proceedings in that Court to determine whether the injunction should be made permanent. The decision of the Court of Appeals has thus set the District of Columbia Court on a potential collision course with the Delaware Court. Such a result is totally unnecessary and completely inconsistent with fundamental principles of comity and the orderly administration of justice.

In general, one federal district court should not interfere with the proceedings of another or attempt to reexamine matters already considered and resolved there. *See* **Hilton Hotels Corp. v. Weaver,** 325 F. 2d 1010 (D. C. Cir. 1963) *cert. denied,* 376 U. S. 951 (1964). "[W]here the jurisdiction of a federal district court has first attached, the right cannot be arrested or taken away by proceedings in another federal district court." **O'Hare International Bank v. Lambert,** 459 F. 2d 328, 331 (10th Cir. 1972). "[A] party who first brings an issue into a court of competent jurisdiction should be free from the vexation of concurrent litigation over the same subject matter." **Martin v. Graybar Electric Co.,** 266 F. 2d 202, 204 (9th Cir. 1959). "Ordinarily, the court first acquiring jurisdiction of a controversy should be allowed to proceed with it without interference from other courts under suits subsequently instituted." **Carbon and Carbide C. Corp. v. United States I. Chemicals,** 140 F. 2d 47, 49 (4th Cir. 1944).

Here, the Delaware Court was the first to acquire jurisdiction over the subject matter of the controversy, and as Chief Judge Latchum has recently noted (132a), not only has he entered a preliminary injunction but the cases before him have now proceeded beyond the discovery stage, a voluminous record relating to the merits has been developed with which he is familiar, and final disposition of the litigation is imminent. In contrast, the District of

Columbia case is at a very preliminary stage with jurisdictional motions still pending and answers to the complaint not even filed by most of the defendants. Assuming *arguendo* the existence of a case or controversy, principles of comity and the orderly administration of justice required the Court of Appeals to remand the case to the District of Columbia Court with directions to stay the proceedings pending resolution of the Delaware litigation.

Although it voiced belief in the need for "conservation of judicial resources and comprehensive disposition of litigation" (13a), the Court of Appeals seemed untroubled by the fact that its order required the District of Columbia Court to proceed on a course which would result at best in its duplicating, and at worst directly conflicting with, the proceedings which had occurred in the Delaware Court and the final resolution of the litigation in that Court, which would clearly have an impact on the District of Columbia litigation as well. The reasons given by the Court of Appeals for its lack of concern on this point were (1) its determination that the Delaware litigation had "run its course" and had been "dismissed in fact" and that the preliminary injunction was "dead" (13a-14a) and (2) its conclusion that the injunction could not be given preemptive effect because no private party seeking the information had participated in the Delaware proceedings and, in the Court of Appeals' view, the CPSC had not adequately represented the pro-disclosure position in the Delaware Court (15a). These rulings by the Court of Appeals were at once so erroneous and such an overextension of the Court's appellate powers that they alone justify certiorari review by this Court.

The improper characterization by the Court of Appeals of the Delaware litigation—again made *sua sponte* and without the benefit of briefs or oral argument on the

subject—lacked support in the record before the Court of Appeals. Moreover, the characterization had no basis in fact, as the parties to the Delaware litigation promptly informed the Court of Appeals in petitions for rehearing and as the Delaware Court itself quickly confirmed (49a). Even assuming the determination in the Court of Appeals' original opinion to have somehow been excusable, despite its undue intrusiveness into the affairs of another court, there can certainly be no excuse for the failure of the Court of Appeals to rectify its obvious error by granting rehearing or at least staying the proceedings below pending resolution of the Delaware litigation.

Nor can there be any merit in the second reason advanced by the Court of Appeals for its disregarding the existence of the Delaware injunction, namely the asserted lack of adequate representation of the pro-disclosure position in the Delaware Court. The CPSC is "hotly contesting" the manufacturers' contentions that the information should not be disclosed (128a), and plaintiffs have always known of and been free to participate in the Delaware proceedings if they felt the pro-disclosure position was not being set forth with sufficient force in that forum. The fact is that plaintiffs chose not to participate in the Delaware proceedings "for strategic reasons" (131a n. 9) and to limit their activity to the proceedings they initiated in the District of Columbia. This deliberate decision cannot provide a basis for ordering the District of Columbia Court to hear plaintiffs' claims notwithstanding the Delaware proceedings. If the Court of Appeal's ruling is permitted to stand, no individual with an interest in the outcome of a litigation would ever participate in that litigation because he could always institute a later suit of his own if the first suit were not resolved to his satisfaction.

3. Under the circumstances of this case, principles of comity and the orderly administration of justice demanded

that at the very least the Court of Appeals not impair the inherent discretion of the District of Columbia Court to stay the proceedings before it pending the imminent resolution of the litigation in the Delaware Court. The failure of the Court of Appeals to modify its remand order to restore this inherent discretion of the District of Columbia Court—as *all* parties, including plaintiffs, urged it should be modified—was clear error, especially in light of the differing postures of the District of Columbia and the Delaware cases and the fact that the final resolution of the Delaware litigation is so imminent (132a). The Court of Appeals' refusal to adopt this obviously indicated course of action can only be interpreted as further evidence of its total disregard for the authority of the Delaware Court. This deliberate flouting by the Court of Appeals of the jurisdiction of another federal court over which it has no authority cannot be countenanced by this Court.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-508.

GTE SYLVANIA, INCORPORATED,
RCA CORPORATION,
THE MAGNAVOX COMPANY,
ZENITH RADIO CORPORATION,
MOTOROLA, INC.,
WARWICK ELECTRONICS, INC.,
AERONUTRONIC FORD CORPORATION,
MATSUSHITA ELECTRIC CORPORATION OF AMERICA,
SHARP ELECTRONIC CORPORATION,
TOSHIBA-AMERICA, INC.,
GENERAL ELECTRIC COMPANY,
ADMIRAL CORPORATION,

Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
PUBLIC CITIZEN'S HEALTH RESEARCH GROUP,
CONSUMER PRODUCT SAFETY COMMISSION,
RICHARD O. SIMPSON,
BARBARA H. FRANKLIN,
LAWRENCE KUSHNER,
CONSTANCE NEWMAN,
R. DAVID PITTLE,
SADYE DUNN,

Respondents.

SUPPLEMENTAL BRIEF AND APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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SUPPLEMENT TO APPENDIX:

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION.

Pursuant to Rule 24(5) of the Rules of the Supreme Court, petitioners herewith submit this Supplemental Brief in Support of their Petition for Writ of Certiorari in order to bring to the attention of this Court a major development which affords further support for petitioners' contention that this Court should strike down the Court of Appeals' directive that the District of Columbia Court proceed to determine "whether or not the documents should, in fact, be disclosed" (15a). That development is the entry of a permanent injunction by the Delaware Court. The permanent injunction prohibits the Consumer Product Safety Commission (CPSC) from disclosing the very documents which the plaintiffs seek to have the District of Columbia Court order the CPSC to release to them.

On December 8, 1977, after additional extensive briefing and argument in the Delaware Court on cross-motions for summary judgment, Chief Judge Latchum of that Court issued a 24-page opinion concluding that disclosure of the documents in question was precluded by Section 6(b)(1) of the Consumer Product Safety Act and had to be permanently enjoined. The opinion (138a-158a) and the permanent injunction (159a-161a) are reprinted and attached hereto as a supplement to the appendix. This new development accentuates the impropriety of further proceedings in the District of Columbia Court and the need to set aside the order of the Court of Appeals.

At the time the petition for certiorari was filed, there was an outstanding preliminary injunction in the Delaware litigation prohibiting the CPSC from disclosing the documents in question and the litigation was fast approaching final disposition. These circumstances alone, we submitted, mandated that the order of the Court of Appeals

(requiring the District of Columbia Court to proceed to determine whether the documents should be disclosed and denying that Court discretion to stay proceedings pending the final outcome of the Delaware litigation) be set aside as being in utter violation of fundamental precepts of judicial administration and proper respect by one federal court for the decisions and actions of another federal court of coordinate jurisdiction.

Now, however, final disposition of the Delaware litigation is no longer "imminent." Final judgment on the merits *has been entered* in petitioners' favor and the CPSC has been permanently enjoined from disclosing to anyone the documents sought by the plaintiffs. The Delaware injunction resolves the issue which the District of Columbia Court has been directed to resolve. Neither the District of Columbia Court nor the Court of Appeals for the District of Columbia Circuit has any right or power to set aside the Delaware permanent injunction.

One federal district court should not be permitted to order a party to do that which another federal district court has specifically prohibited it from doing. Yet, this is precisely what the plaintiffs seek from the District of Columbia Court and precisely what the decision of the Court of Appeals suggests. The fact that the plaintiffs in this action were not parties to the Delaware litigation is irrelevant since the CPSC was a party, is bound by the Delaware Court's injunction, and cannot disregard it. If the plaintiffs wish to persist in their efforts to obtain the documents, their remedy is to take action in the Delaware Court to challenge or seek modification of the injunction. Proceedings in the District of Columbia Court whose sole objective is a ruling and order directly contrary to the Delaware Court's ruling and injunction are totally unwarranted and cannot be permitted.

In his brief in opposition to the petition the Solicitor General agrees (p. 6) that "the Court of Appeals erred in directing the district court to proceed expeditiously to adjudicate the merits notwithstanding the pendency of the proceeding in Delaware and the outstanding preliminary injunction issued by the Delaware Court." However, the Solicitor General is not unduly disturbed by this error because of his sanguine belief (p. 7) that "the subsequent final decision by the Delaware Court constitutes a change in circumstances that would permit, if not require, the District of Columbia Court to stay its hand."

We agree that if the District of Columbia Court does not dismiss the action, it should at least "stay its hand" now that a permanent injunction has been entered. However, we do not feel that the Solicitor General's pronouncement of "change in circumstances", no matter how influential, can serve as an adequate substitute for this Court's vacation of the order which the Solicitor General indicates is so clearly in error. It is too taxing on the resources of the courts and of petitioners to reserve future review by this Court until after a possibly long and duplicative proceeding in the District of Columbia Court. We submit that the matter can be disposed of now without further consideration below.

The petition for writ of certiorari should be granted and the case reviewed in this Court. Should the Court not deem the case worthy of full review, we urge that certiorari be granted and that, in light of the permanent injunction entered in the Delaware litigation, the judgment of the Court of Appeals be vacated and the case remanded to that Court with directions to affirm the dismissal of the instant suit by the District of Columbia Court. At a minimum, the case should be remanded to the Court of Appeals with instructions to reconsider its decision in light of the permanent injunction.

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SUPPLEMENT TO THE APPENDIX.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-104

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

December 8, 1977

Opinion.

LATCHUM, *Chief Judge.*

On October 23, 1975, this Court made extensive findings of fact and conclusions of law when it granted plaintiffs'[1] motions to enjoin preliminarily the Consumer Product Safety Commission (the "Commission") from disclosing certain "TV-related accident data" submitted by the plaintiffs and a computer printout summarizing that data to the public in response to a request made under the Freedom of Information Act ("FOIA"), 5 U. S. C. § 552. GTE Sylvania Inc. v. Consumer Product Safety Commission, 404 F. Supp. 352 (D. Del. 1975). Because the prior opinion sets forth the factual background of this litigation in great detail, it will not be rehearsed here.

1. Originally there were thirteen separate actions brought by as many television manufacturers which were consolidated for consideration of plaintiffs' motions for a preliminary injunction. Since the Court's opinion of October 23, 1975, the suit brought by Teledyne Mid-America Corp., C. A. No. 75-122, has been dismissed by stipulation of the parties. Docket Item 63 (all docket item references are to C. A. No. 75-104).

The Court based its decision to grant a preliminary injunction on the Commission's failure to comply with Section 6(b)(1) of the Consumer Product Safety Act (the "Act"), 15 U. S. C. § 2055(b)(1). Section 6(b)(1) provides in pertinent part:

> The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, [1] that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and [2] that such disclosure is fair in the circumstances and [3] reasonably related to effectuating the purposes of [the Act].

The Court found on the uncontested facts that the Commission had wholly failed to take reasonable steps to assure that any of the three prerequisites for public disclosure of the TV-related accident data were met. 404 F. Supp. at 370-73.

The consolidated cases are presently before the Court (1) on plaintiffs' motion for summary judgment to make the preliminary injunction permanent[2] and (2) on the Commission's motions to vacate the outstanding preliminary injunction and for summary judgment.[3]

Despite the two-year passage of time, the undisputed facts upon which the Court based its earlier decision have not changed. Thus, the Court need not reconsider any of its earlier findings and conclusions in order to take account of any intervening changes in the *factual* situation. However, the Commission does contend that there have been intervening *changes of law* which should prompt this Court to reconsider its previous decision. To these arguments we now turn.

2. Docket Item 86.
3. Docket Items 79 & 80.

I. Commission's Interpretation of Section 6(b)

First, in opposing the plaintiffs' motions for a preliminary injunction, the Commission suggested that Section 6(b)(1) applies only to affirmative disclosures initiated by the agency, such as press releases and publications, and not to disclosures made in response to FOIA requests.[4] The Court rejected such an interpretation of Section 6(b) because it contravened the legislative history of the section.[5] Nevertheless, the Commission has renewed the argument, contending that two developments since the Court's previous decision support the Commission's position. The developments are: (1) the Commission formally endorsed the interpretation of Section 6(b)(1) which limits the section's applicability to "affirmative" disclosures initiated by the agency,[6] and (2) Congress, in explaining a 1976 amendment to Section 29 of the Act (15 U. S. C. § 2078), used language which arguably indicates acceptance of the Commission's interpretation. After considering both these developments, however, the Court remains convinced that Congress did not intend to make Section 6(b) inapplicable in the face of an FOIA request.

4. *See* Docket Item 35, p. 14, n. 4.

5. GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra*, 404 F. Supp. at 369-70.

6. The Commission recorded its interpretation of Section 6(b) as a "minute" of an executive session held on October 6, 1975 (Docket Item 80, Ex. C). Although that interpretation preceded the decision on the preliminary injunction motion by a few weeks, the Commission did not inform the Court of it at that time. In addition, the Commission recently published proposed procedures for complying with Section 6(b). 42 Fed. Reg. 54,304 (1977) (to be codified in 16 C. F. R. Part 1013). In the prefatory comments, the Commission reiterated its view that Section 6(b) applies only when it "actively and publicly discloses information." *Id.*

The Commission, relying on three Supreme Court cases,[7] contends that its interpretation of Section 6(b) deserves great weight in this Court. Although the cases cited establish the principle that on matters of statutory construction a court should give deference "to the interpretation given the statute by the officers or agency charged with its administration," [8] they do not justify the application of that principle in this case. Two of them, Zemel v. Rusk, 381 U. S. 1, 11-12 (1965) and Udall v. Tallman, 380 U. S. 1, 16-18 (1965), involved long-established administrative interpretations which the respective agencies had applied consistently and frequently.[9] In sharp contrast, the interpretation being advanced by the Commission here did not arise until after the present controversy began. The third case cited by the Commission, E. I. duPont de Nemours & Co. v. Collins, — U. S. —, —, 97 S. Ct. 2229, 2234 (1977), is also distinguishable. There, the Supreme Court held that the Fourth Circuit erred in substituting its judgment for that of the Securities Exchange Commission ("SEC") as to the appropriate method

7. E. I. duPont de Nemours & Co. v. Collins, — U. S. —, —, 97 S. Ct. 2229, 2234 (1977); Zemel v. Rusk, 381 U. S. 1, 11 (1965); Udall v. Tallman, 380 U. S. 1, 16 (1965).

8. Udall v. Tallman, *supra*, 380 U. S. at 16.

9. In both cases, Congress knew about the administrative interpretations of the statutes in question but had not amended those statutes. The Court viewed such Congressional inaction as indicating approval of the agency's position. Zemel v. Rusk, *supra*, 381 U. S. at 11; Udall v. Tallman, *supra*, 380 U. S. at 17-18. It is noteworthy that since this Court rejected the Commission's interpretation in its prior decision, Congress has not amended Section 6(b), although that decision has been brought to Congress' attention and other sections of the Consumer Product Safety Act have been amended. *See* Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, 90 Stat. 503; for instances where representatives of the Commission discussed this Court's prior decision before Congressional committees, *see* Docket Item 112, p. 24-25.

for determining value in a merger involving a closed end investment company. The Court noted that the SEC had "long recognized" the method it used, and that it was, "as Congress contemplated, the product of the agency's long and intimate familiarity with the investment company industry." *Id.* at —, 97 S. Ct. at 2234. This case, on the other hand, presents a narrow legal issue which is readily susceptible to judicial resolution and requires no special expertise of the Commission. In sum, because none of the factors which warrant deference to an agency's position exist in this case, the Court will accord no special weight to the Commission's interpretation of Section 6(b)(1).

The second development which the Commission contends supports its interpretation of Section 6(b)(1) is a a statement in the legislative history of a 1976 amendment to Section 29 of the Act.[10] Section 29, 15 U. S. C. § 2078, concerns cooperation between the Commission and other federal and state agencies. The 1976 amendment authorizes the Commission to provide nonconfidential portions of accident and investigation reports to such agencies. 15 U. S. C. § 2078(c). The amendment further provides:

> No Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section [6(b) of the Act]. *Id.*

10. Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 15, 90 Stat. 510 (amending 15 U. S. C. § 2078 (Supp. III 1973)).

The explanation of the amendment to Section 29 contained in the Conference Report includes the following statement:

> The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees *to supersede or conflict with* the requirements of the [FOIA] (5 U. S. C. 552(a)(3) and (a)(6)). The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the [FOIA].

H. R. Rep. No. 1022, 94th Cong., 2d Sess. 27, *reprinted in* [1976] U. S. Code Cong. & Ad. News 1029 (emphasis supplied).

Although the statement of the Conference Committee appears consistent with the interpretation espoused by the Commission, it does not present a reliable basis for inferring that four years earlier, when Section 6(b) was enacted, Congress intended to make it inapplicable to disclosures made in response to FOIA requests. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U. S. 304, 313 (1960), *quoted in* United States v. Philadelphia National Bank, 374 U. S. 321, 348-49 (1963). Similarly, the impact of the Conference Committee's statement is diminished by the failure of Congress to amend Section 6(b) in 1976, when it presumably knew[11] of the prior decision in this case, in which the Court stated:

11. *See* note 9 *supra*.

> "To argue that [Section 6(b)(1)] becomes irrelevant during the pendency of a FOIA demand is to ignore a clear Congressional concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer. Congress was aware that FOIA requests for information gathered by the Commission would be forthcoming but, nevertheless, imposed affirmative obligations on the Commission which cannot flippantly be avoided." GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra*, 404 F. Supp. at 1370 (footnote omitted).

Finally, by stating that they did not intend the Section 29 requirement of compliance with Section 6(b) "to supersede or conflict with the requirements of the [FOIA] (5 U. S. C. 552(a)(3) and (a)(6))," the conferees emphasized the need for some sort of accommodation between the different time restraints imposed by Section 6(b) and the FOIA. Notably, the statement does not make Section 6(b) altogether inapplicable in the face of a FOIA request, as the Commission would do.

The provisions of the FOIA cited by the conferees [12] impose a duty on federal agencies to respond within ten days in most cases, and promptly in any event, to FOIA requests. Section 6(b)(1) provides that at least thirty

12. Subsection (a)(3) of 5 U. S. C. § 552 provides that each agency, upon request, shall make reasonably described records "promptly available" to the requester. Subsection (a)(6) requires an agency to determine within ten days (excepting Saturdays, Sundays and legal public holidays) after the receipt of a FOIA request whether to comply with the request and provides for a ten-day extension of that time limit in "unusual circumstances." Subsection (a)(6) further provides that a requester shall be deemed to have exhausted his administrative remedies if the agency fails to comply with the prescribed time limits. 5 U. S. C. § 552(a)(6)(C).

days prior to disclosing information from which the identity of a manufacturer can be readily ascertained the Commission must, "to the extent practicable, notify" such manufacturer and provide him "with a reasonable opportunity to submit comments to the Commission in regard to such information." 15 U. S. C. § 2055(b)(1). The Commission contends than an "impermissible conflict" exists between the thirty-day notice requirement of Section 6(b) and the ten-day time limit for responses under the FOIA.[13] The Court disagrees, because in 1972 when Congress enacted the Consumer Product Safety Act, the FOIA required only that an agency make records "promptly available" to any person requesting them.[14] The ten-day requirement was not introduced until 1974, when Congress amended the FOIA.[15] Given that Section 6(b) has not been amended since 1972, the differences between the time periods specified in Section 6(b) and the FOIA cannot be used to infer a Congressional intent to limit the application of Section 6(b) to affirmative disclosures. Indeed, such an interpretation completely ignores the legislative history of Section 6(b). *See* Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, — F. Supp. — (W. D. N. Y., *filed* October 26, 1977) (C. A. No. 75-410) (slip op.)

The Court concludes, therefore, that Section 6(b) applies to all disclosures which are not exempted from compliance by Section 6(b)(2), 15 U. S. C. § 2055 (b)(2),[16] and the Commission should attempt to accom-

13. Docket Item 81, pp. 17-19.

14. Pub. L. No. 90-23, 81 Stat. 54 (1967) (current version at 5 U. S. C. § 552(a)(6)).

15. Pub. L. No. 93-502, § 1(c), 88 Stat. 1562 (1974) (codified at 5 U. S. C. § 552(a)(6)).

16. The Commission contends that if Section 6(b)(1) applies in this case, it also must apply to thousands of other records, such

modate the time periods of both statutes to the fullest extent practicable.[17]

II. Amendment to FOIA Exemption 3

Next, the Commission argues that the Court should reconsider and reverse its prior holding that Section 6(b)(1) is a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U. S. C. § 552(b)(3), because Congress amended that exemption in 1976 with the express intent of overruling the Supreme Court's ruling in

16. (Cont'd.)
as consumer complaints and petitions for rulemaking under Section 10 of the Act, 15 U. S. C. § 2059, which are regularly requested under the FOIA. Docket Item 81, pp. 18-19. The Court expresses no opinion on this proposition, except to note, without deciding, that petitions for rulemaking under Section 10 arguably are exempt from the requirements of Section 6(b)(1) as information concerning an administrative proceeding within the meaning of Section 6(b)(2)(B).

17. *Cf.* Chrysler Corp. v. Schlesinger, — F. 2d —, 14 E. P. D. ¶ 7868, at 6312 (C. A. 3, 1977). In the *Chrysler* case, a government agency notified Chrysler that it had received a request under the FOIA for certain documents concerning one of Chrysler's plants. The agency's regulations permitted a contractor to challenge a decision to disclose such information and guaranteed a final decision within thirty days from the date the challenge was filed. *Id.* at —, 14 E. P. D. ¶ 7868, at 6304-05, 6314 n. 27. Due to the ten-day response time prescribed by the FOIA, the agency, upon deciding to release the information, informed Chrysler that it could not await the results of an administrative appeal and would release the information five working days later. *Id.* at —, 14 Empl. Prac. Dec. ¶ 7868, at 6305. Chrysler filed suit in a district court to enjoin the disclosure and the Third Circuit held the case was ripe for judicial review despite Chrysler's failure to exhaust its administrative appeal remedy. *Id.* at —, 14 Empl. Prac. Dec. ¶ 7868, at 6312. Contrary to the Commission's contention (Docket Item 111, p. 5), the Court in *Chrysler* did not "reject[ ] agency proceedings which would conflict with the mandate of the FOIA time requirements"; rather, the court resolved the conflict in a manner calculated to give effect to the purposes of both the FOIA and the administrative review procedures.

FAA v. Robertson, 422 U. S. 255 (1975), upon which this Court relied in reaching its previous decision. Although the change in the law clearly necessitates reconsideration of the issue, the Court cannot agree with the defendants' position that Exemption 3, as amended, does not exempt material withheld pursuant to Section 6(b)(1).

Originally, Exemption 3 of the FOIA provided:

> (b) This section does not apply to matters that are—
>
> • • •
>
> (3) specifically exempted from disclosure by statute.

5 U. S. C. § 522(b)(3) (1970) (amended 1976). Congress amended this exemption in 1976 to exclude from the mandatory disclosure provisions of the FOIA, matters that are

> (3) specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.[18]

The Conference Committee, which was responsible for the language of the amendment as finally enacted, explained the purpose of the amendment as follows:

> The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA*

18. Pub. L. No. 94-409, § 5(b), 90 Stat. 1241 (1976). The amendment passed as a rider to the Government in the Sunshine Act. Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 Colum. L. Rev. 1029, 1041 n. 70 (1976).

v. Robertson, 422 U. S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U. S. C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U. S. C. 1306).[19]

The thrust of the defendants' argument is that Section 6 (b)(1) is indistinguishable from the statute involved in *FAA v. Robertson, supra.* Because Congress expressed a clear intent to exclude Section 1104 of the Federal Aviation Act of 1958 (49 U. S. C. § 1504) from Exemption 3, the Commission contends that Section 6(b)(1) of the Consumer Product Safety Act (15 U. S. C. § 2055(b)(1)) must be excluded from the exemption as well.

Section 1104 authorizes the Administrator, upon receipt of a written objection, to withhold information from public disclosure if, in his judgment, disclosure "would adversely affect the interests of [the objecting party] and is not required in the interest of the public." 49 U. S. C. § 1504. By holding that information withheld pursuant to Section 1104 constituted matter "specifically exempted from disclosure by statute" within the meaning of the original Exemption 3, the Supreme Court in *FAA v. Robertson, supra,* made it possible for government officials to avoid the mandatory disclosure provisions of the FOIA on general discretionary grounds such as "in the public interest." Congress reacted by amending Exemption 3 to

19. H. R. Rep. No. 1441, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2250 (Conference Report). The intent to undo *FAA v. Robertson, supra,* was also evident earlier in the legislative process. *See* H. R. Rep. No. 880, Part I, 94th Cong., 2d Sess. 9-10, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2191-92; Note, *supra* note 18, 76 Colum. L. Rev. at 1042-44.

prevent agencies from avoiding disclosure on such nebulous grounds.[20]

After comparing the two statutes, the Court concludes that Section 6(b)(1) does not afford the Commission the same broad discretion to withhold information that Section 1104 gives to the Administrator of the FAA. Section 6 (b)(1) requires the Commission, as a prerequisite to disclosing "information from which the identity of [a] manufacturer or private labeler may be readily ascertained," to "take reasonable steps to assure": (1) that the information is "accurate," (2) that the disclosure is "fair in the circumstances," and (3) that the disclosure is "reasonably related to effectuating the purposes of [the Act]." 15 U. S. C. § 2055(b)(1). The requirement of accuracy most clearly distinguishes Section 6(b)(1) from Section 1104 of the Federal Aviation Act, because "accuracy" is a more definite and objective standard than the "interest of the public." Similarly, the Court considers the fairness criteria in Section 6(b)(1) more susceptible to effective judicial review than the public interest standard of Section 1104.[21]

Having found Section 6(b)(1) distinguishable from the statutes [22] which Congress specifically stated would not

20. *See* Seymour v. Barabba, 559 F. 2d 806, 807 (C. A. D. C. 1977).

21. *See* Note, *supra* note 18, 76 Colum. L. Rev. at 1045 & n. 100.

22. Besides Section 1104 of the Federal Aviation Act of 1958 (49 U. S. C. § 1504), the Conference Report also identified Section 1106 of the Social Security Act (42 U. S. C. § 1306) as a statute whose terms do not bring it within Exemption 3. H. R. Rep. No. 1441, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2250 (Conference Report). Section 1106 of the Social Security Act prohibits disclosure of a wide range of social security information, except as the Secretary of HEW or the Secretary of Labor "may by regulations prescribe." 42 U. S. C. § 1306(a). Thus, Section 1306 vests virtually "unfettered and unguided power" in the Secretary to determine what information to disclose. Stretch v. Weinberger, 495 F. 2d 639, 640 (C. A. 3, 1974). As indicated above, the Commission's discretion under Section 6(b)(1) is much more circumscribed.

be covered by Exemption 3, we now turn to the language of the exemption itself to determine whether Section 6 (b)(1) falls within its ambit. The two provisos of Exemption 3 are in the disjunctive. Subpart A exempts from the FOIA matters that are "specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." Because Section 6(b)(1) affords the Commission some discretion in determining whether to withhold material from the public, it is not the type of mandatory nondisclosure statute described in subpart A of Exemption 3. *See* Irons v. Gottschalk, 548 F. 2d 992, 994 n. 3 (C. A. D. C. 1976), *petition for cert. filed,* 46 U. S. L. W. 3055 (August 18, 1976) (No. 77-203). Subpart B exempts matters authorized to be withheld pursuant to one of two distinct types of statutes: (1) those which establish "particular criteria for withholding" and (2) those which "refer[ ] to particular types of matters to be withheld." 5 U. S. C. § 552(b)(3); *see* Kruh v. General Services Administration, 421 F. Supp. 965, 967 n. 4 (E. D. N. Y. 1976). The plaintiffs argue that Section 6(b)(1) satisfies both the standards contained in subpart B of Exemption 3. However, because the Court agrees that Section 6(b)(1) establishes particular criteria for withholding, it is unnecessary to decide whether the statute also refers to particular matters to be withheld.

The only guidance which Congress provided concerning the contours of the exemption for statutes establishing particular criteria for withholding is that it does not extend to statutes like the one at issue in *FAA v. Robertson, supra.* The few cases decided since the amendment became effective in March of 1977 have not shed much more light on

the matter.[23] It is noteworthy, however, that the only commentator to address the issue has concluded that Section 6(b)(1) would fall within the amended Exemption 3, under the "particular criteria for withholding" rubric. Note, *supra* note 18, 76 Colum. L. Rev. at 1045 n. 100. The legislative histories of Section 6(b)(1) and Exemption 3 support the same conclusion. As the Court stated in its prior decision in this case, Section 6(b)(1) reflects the balance struck between the Commission's need to have complete access to information relevant to its statutory responsibilities and Congress' "concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer." GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra,* 404 F. Supp. 352, 370 & n. 79. Due to the sensitive nature of much of the information the Consumer Product Safety Act authorized the Commission to gather, the House Committee on Interstate and Foreign Commerce reported that it had

> written into section 6 [15 U. S. C. § 2055] of the bill *detailed requirements and limitations relating to the*

23. In a case strikingly similar to this one, a district court judge held that Section 6(b)(1) of the Act "is a statute setting forth particular criteria for withholding information" and, therefore, falls within the ambit of FOIA Exemption 3. Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, — F. Supp. —, — (W. D. N. Y., decided October 26, 1977) (C. A. No. 75-410) (slip op. at 8). In that case, however, the court relied on *FAA v. Administrator, supra* and this Court's prior decision without discussing the legislative history of the amendment to Exemption 3 and its effect on the continuing validity of those two precedents.

Two other cases decided after the amendment to Exemption 3 became effective concerned Subpart A and the "particular types of matter" standard of Subpart B of the exemption, respectively. *See* Seymour v. Barabba, 559 F. 2d 806 (C. A. D. C. 1977); Founding Church of Scientology v. National Security Agency, 434 F. Supp. 632 (D. D. C. 1977).

> *Commission's authority to disclose information* which it acquires in the conduct of its responsibilities under this Act.

H. R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972) (emphasis supplied). As the emphasized language makes clear, Congress intended Section 6(b)(1) to limit the discretion of the Commission to disclose information submitted to it.

A review of the legislative history of the original version of Exemption 3 led the Third Circuit "to a firm conviction that the absence of [legislatively prescribed] standards to govern broad agency discretion was the chief evil at which Congress aimed." Stretch v. Weinberger, 495 F. 2d 639, 640-41 & n. 5 (C. A. 3, 1974). Nothing in the legislative history of the amendment to Exemption 3 suggests that the intent of Congress has changed.[24] Rather, the amendment overruled *FAA v. Robertson, supra,* in which the Supreme Court, according to Congress, had "misconceive[d] the intent of Exemption 3" by interpreting it to include a statute which granted an agency almost unlimited discretion to withhold documents. *See* H. R. Rep. No. 880, 94th Cong., 2d Sess., pt. 1, at 23, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2205; Seymour v. Barabba, *supra,* 559 F. 2d at 807. Congress did not exclude from the amended Exemption 3 all statutes which give an agency some discretion concerning whether to disclose certain information. Therefore, the Court concludes that Section 6(b)(1), which requires the Commission to

24. *See generally* Note, *supra* note 18, 76 Colum. L. Rev. at 1041-43. The author concluded that Congress intended to limit the exemption to statutes in which the concern for secrecy emanated from Congress rather than the agency. *Id.* He would assess the particularity of the criteria for withholding information according to their amenability to *de novo* judicial review, as provided for by the FOIA. *Id.* at 1045.

take reasonable steps to assure accuracy, fairness and a statutory purpose before disclosing information which identifies a manufacturer, establishes particular criteria for withholding and falls within Exemption 3 of the FOIA, as amended.

III. Third Circuit's Decision in Chrysler v. Schlesinger.

The final legal development which the Commission contends should lead this Court to modify the findings and conclusions made in conjunction with the issuance of the preliminary injunction is the decision of the Third Circuit in Chrysler Corp. v. Schlesinger, — F. 2d —, 14 Empl. Prac. Dec. ¶ 7868 (C. A. 3, 1977). In *Chrysler* the court held that "the APA provides a cause of action for enjoining an agency from disclosing submitter-generated information," citing with approval the prior decision in this case. *Id.* at —, 14 Empl. Prac. Dec. ¶ 7868, at 6311, 6318 n. 88.[25] In addition to recognizing a reverse FOIA cause of action, the Third Circuit suggested that in such cases the courts employ the following analytical approach in reviewing an agency's decision to disclose:

> First it should inquire whether any non-disclosure statute or non-disclosure regulation is applicable. If so, the court must conclude that the agency has acted outside the scope of its statutory authority, and should enjoin disclosure. If no non-disclosure statute or regulation applies, the court must then determine under what authority the agency intends to disclose the contested information. If the agency has con-

25. In light of *Chrysler Corp. v. Schlesinger, supra,* the Commission has abandoned its argument that this Court lacks jurisdiction to review the decision to release the records at issue here. Docket Item 118, p. 5.

> cluded that the contested information does not fall within any FOIA exemption, thus mandating disclosure, the court must examine whether the agency applied the proper legal standards for the applicability of the FOIA exemptions. * * * Finally, if the agency record does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court to effectively perform the above analysis, the remedy is not a trial *de novo*, but a remand to the agency for an additional record or explanation for its decision.

Id. at —, 14 Empl. Prac. Dec. ¶ 7868, at 6311-12 (footnote omitted).

In the case *sub judice*, the Commission concluded that the contested information did not fall within any FOIA exemption. Having already decided that, by virtue of Section 6(b)(1) of the Act, Exemption 3 applies to the accident data the Commission intends to disclose, the Court will bypass the first of the suggested inquiries—"whether any non-disclosure statute or non-disclosure regulation is applicable." [26] Instead, the Court turns to the Commission's alternative argument that, even if Exemption 3 applies, the Commission has complied with the requirements of Section 6(b)(1).

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26. At oral argument, the plaintiffs argued that Sections 6(a)(2) and 6(b)(1) of the Consumer Product Safety Act (15 U. S. C. §§ 2055(a)(2) and (b)(1)) and 18 U. S. C. § 1905, which is incorporated in Section 6(a)(2), are "non-disclosure statutes" as that phrase was used in the *Chrysler* opinion. (Transcript ("T. —") 17-19). The Commission disputed the characterization of Section 6(b)(1) as a "non-disclosure statute" and argued that the plaintiffs have not shown that the contested information is protected from disclosure by Section 6(a)(2) and 18 U. S. C. § 1905. (T. 30-31, 38-39). The Court expresses no opinion on these issues.

The decision to grant the plaintiffs' motions for a preliminary injunction was based on the finding that the Commission had not satisfied its duty under Section 6(b)(1) to take reasonable steps to assure (1) that the accident data is "accurate," (2) that disclosure would be "fair in the circumstances," and (3) that disclosure would be "reasonably related to effectuating the purposes of [the Act]." GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra*, 404 F. Supp. at 370-373. The Court expressly held that the Commission's proposals (1) to release the accident data with a statement pointing out the differing qualities of recordkeeping among the manufacturers and (2) to correct any inaccuracies identified by the manufacturers were insufficient to satisfy the affirmative duties imposed by Section 6(b)(1). *Id.* at 371-72 & n. 81. Nevertheless, the Commission now argues that these steps, together with an offer to release with the data "statements prepared by the manufacturers describing how their subpoenaed data should be viewed," constitute compliance with the three criteria for disclosure.[27] Not wishing to repeat the analysis in its prior opinion, the Court notes only that the inclusion of such statements by the manufacturers will not facilitate meaningful comparisons of the accident data to determine the relative safety of the various manufacturers' products. Much of the data will remain unverified. The inaccuracies and unfairness introduced by the Commission's failure to clarify ambiguities in the definition of "TV-related accident" in the subpoenas and to seek full compliance with its subpoenas will persist. In

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27. Docket Item 81, p. 35. In Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, *supra*, — F. Supp. at — (slip op. at 4 n. 3), the court concluded that the inclusion of a statement by the manufacturer asserting its viewpoint would not dispel the possibility of irreparable harm from disclosure of information like that at issue here.

short, the Commission still has failed to demonstrate that disclosure is reasonably related to effectuating the purposes of the Act.[28] Accordingly, the Court finds that the Commission has not fulfilled its responsibilities under Section 6(b)(1).

The last step in the analytical framework set forth in Chrysler Corp. v. Schlesinger, *supra*, requires a remand to the agency, "if the agency record does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court to effectively perform the . . . analysis." Seizing upon this language, the Commission argues that a remand is appropriate here, because "the record is unclear, as to whether or not 6-b(1) was considered" in processing the request for the accident reports.[29] The Court disagrees. As noted in the prior opinion,[30] the administrative records in this case supplemented by the affidavit of Constance B. Newman,[31] Vice Chairman of the Commission, and the deposition of Robert L. Northedge,[32] who was the project director of the Com-

28. The fact that the accident data could be compared profitably on the basis of the presence or absence of safety features or on the basis of type, such as black and white televisions versus color televisions, is irrelevant. The Commission could accomplish that purpose without identifying the manufacturers.

29. T. 30; Docket Item 118, p. 7.

30. GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra*, 404 F. Supp. at 368-69 & n. 70.

31. Docket Item 27 (C. A. No. 75-112).

32. Based on the holding in Chrysler Corp. v. Schlesinger, *supra*, — F. 2d at —, 14 Empl. Prac. Dec. ¶ 7868, at 6311, that judicial review in reverse FOIA cases should be limited to the administrative record and should not involve a trial *de novo*, the Commission now contends that Court should not consider portions of the Northedge deposition. (T. 43). The argument is without merit. This Court's determinations in the prior opinion concerning the scope of judicial review and the materials to be reviewed comport completely with the principles expressed in the *Chrysler* case. Relying on Citizens to Preserve Overton Park v. Volpe, 401 U. S. 402, 420 (1971), and Camp v. Pitts, 411 U. S. 138, 142-43 (1973), the Court decided to supplement the administrative record with the Newman affidavit and Northedge deposition in order to understand the basis for the Commission's decision to disclose the accident data. GTE Sylvania Inc. v. Consumer Products Safety Commission, *supra*, 404 F. Supp. at 367-68. The Third Circuit explicitly recognized the propriety of such a procedure in the *Chrysler* opinion. — F. 2d at —, 14 Empl. Prac. Dec. ¶ 7868, at 6318 n. 96.

Mr. Northedge occupied a position of responsibility with respect to gathering and processing of the TV-related accident data. The Commission itself produced him as the person best able to explain the data gathering process. The Court concludes, therefore, that there is no reason to exclude the Northedge deposition. Moreover, the opinions expressed by Mr. Northedge concerning the misleading nature of the information and the absence of any use for it are merely cumulative, and do not form the basis for the Court's decision.

mission's investigation of television hazards, provides this Court with an adequate foundation for effective review. Moreover, the Court foresees no benefit which possibly could flow from a remand in the circumstances of this case.

Conclusion

In conclusion, the Commission has presented no new facts which warrant modification of the findings of fact and conclusions of law made in conjunction with the issuance of the preliminary injunction. The Commission has referred to several changes in the law since the Court's prior decision, but none of these affect the validity of the previous conclusions. Specifically, the Court rejects the Commission's interpretation of Section 6(b)(1) as applying to "affirmative" agency disclosures, but not to disclosures made in response to FOIA requests. Where as in this case, an FOIA request is received for information from which the identity of a manufacturer can be readily ascertained and which is otherwise subject to Section 6(b)(1),

the Commission must comply with Section 6(b)(1) before disclosing that information. Furthermore, if the Commission fails to take reasonable steps to assure that the information is accurate and that disclosure will be fair and serve a statutory purpose, the information will be exempt from disclosure under FOIA Exemption 3. The TV-related accident data at issue here is exempt from disclosure, because the Court finds that the Commission still has not complied with Section 6(b). Finally, the Court finds that the disclosure of this information in its present unverified state and in a manner which identifies the manufacturers would result in irreparable harm to the plaintiffs for the reasons set forth in the Court's previous opinion. 404 F. Supp. at 373-74.

Accordingly, the plaintiffs' motion for summary judgment will be granted and a permanent injunction against the public disclosure of the accident data and the computer printout will be entered.

This opinion shall constitute the findings of fact and conclusions of law required by Rule 52, F. R. Civ. P.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No.75-104

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISION, et al.

Judgment and Permanent Injunction.

On the basis of findings of fact and conclusions of law set forth in the Court's opinion of October 23, 1975 (404 F. Supp. 352) and the Court's opinion of this date entered in these cases, it is

ORDERED

1. Summary judgment is hereby entered in favor of the plaintiffs and against the defendants.

2. Defendants' motions to vacate the outstanding preliminary injunction and for summary judgment are denied.

3. The defendants Consumer Product Safety Commission ("Commission"), its members, agents, officers, employees and all other persons in active concert and participation with them are hereby enjoined from disclosing to the public in any manner:

(a) Any data submitted by plaintiffs to the defendant Commission in response to a special order issued May 13, 1974;

(b) Any data submitted by plaintiffs to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

(c) Any report, extraction, computer analysis, or other document or documents purporting to be a summary or compilation of the data previously supplied to the Commission described in sub-paragraphs (a) and (b) above.

4. Provided, however, the Commission is not enjoined hereby from making certain limited disclosures to Underwriters Laboratories, Inc. ("UL"), the entity retained by the Commission to develop safety standards for television receivers under 15 U. S. C. § 2056, upon the following terms and conditions:

(a) UL and those assisting in development of safety standards for television receivers shall be permitted access to computerized summaries of "accident reports" submitted to the Commission in response to the Commission's July 26, 1974 subpoena duces tecum (served on 12 television manufacturers) in a form that does not, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis. The computerized summaries shall contain no identifying symbols which will permit identification of "accidents" reported by a single manufacturer.

(b) For the sole purpose of developing safety standards for television receivers and not for public disclosure, the following employees of UL shall be permitted access to all of the "accident reports" and data submitted to the Commission by the 12 television manufacturers: Mr. S. David Hoffman, Mr. John Stevenson, Mr. Steven Coen and Ms. Frances Newell. These four employees of UL will make use of such "accident reports" and data only in connection with the development of safety standards for television receivers and will not disclose the "accident reports" or data nor make any written or oral reports of the contents thereof to any person other than an employee of the Commission. No other written or oral reports will be prepared by these four employees of UL, which will in any way, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis.

5. Provided further, however, that the Commission is not enjoined hereby from public disclosure of the "Report on Analysis of TV Accident Data to Consumer Product Safety Commission," dated April 25, 1975 by Robert A. Yereance (the "Yereance Report") so long as that Report or any accompanying information does not in any way, directly or indirectly, identify the manufacturers, model or chassis number of any television receivers alleged to have been involved in any "accidents" allegedly associated with any particular manufacturer, model or chassis.

6. Copies of this permanent injunction shall be furnished to Messrs. Hoffman, Stevenson and Coen, and Ms. Newell, and all others assisting UL in the development of safety standards for television receivers forthwith.

Dated: December 8, 1977.

/s/ JAMES L. LATCHUM
James L. Latchum
Chief Judge

Supreme Court, U. S.
FILED
OCT 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-508

GTE SYLVANIA, INCORPORATED,
RCA CORPORATION,
THE MAGNAVOX COMPANY,
ZENITH RADIO CORPORATION,
MOTOROLA, INC.,
WARWICK ELECTRONICS, INC.,
AERONUTRONIC FORD CORPORATION,
MATSUSHITA ELECTRIC CORPORATION OF AMERICA,
SHARP ELECTRONIC CORPORATION,
TOSHIBA-AMERICA, INC.,
GENERAL ELECTRIC COMPANY,
ADMIRAL CORPORATION,

Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
PUBLIC CITIZEN'S HEALTH RESEARCH GROUP,
CONSUMER PRODUCT SAFETY COMMISSION,
RICHARD O. SIMPSON,
BARBARA H. FRANKLIN,
LAWRENCE KUSHNER,
CONSTANCE NEWMAN,
R. DAVID PITTLE,
SADYE DUNN,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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APPENDIX.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Before: BAZELON, *Chief Judge*, and WRIGHT AND ROBINSON, *Circuit Judges*.

Argued September 21, 1976
Decided July 5, 1977

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: We consider here an appeal from a dismissal of an action brought by the appellants under the Freedom of Information Act (FOIA), 5 U. S. C. § 552 (1970 & Supp. V 1975). They seek to obtain, from the Consumer Product Safety Commission, reports which various television manufacturers have submitted on television-related accidents.

For the reasons stated below, we reverse the District Court's dismissal of the plaintiffs' action and remand the case for further proceedings.

I. The Parties

Appellant Consumers Union is a nonprofit consumer organization. It provides information—through its monthly magazine *Consumer Reports* and through other means—on the merits, defects, dangers, and comparative efficacy of consumer goods, including television sets. Appellant Public Citizen, also a nonprofit organization, funds the Health Research Group which conducts research and publishes information for consumers relating to potential hazards to health and safety from consumer products.

Appellee Consumer Product Safety Commission is an independent regulatory agency established by Congress in 1972 pursuant to its enactment of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (Supp. V 1975). The Commission's purpose is to help implement the Act's policy of establishing "comprehensive and effective regulation over the safety of unreasonably hazardous consumer products." [1] Several of the officers of the Commission and 12 companies that manufacture television sets and do business in the District of Columbia were, together with the Commission, also named as defendants below and are also appellees before this court.

---

1. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 26 (1972). The purposes of the Act are:

> (1) to protect the public against unreasonable risks of injury associated with consumer products;
>
> (2) to assist consumers in evaluating the comparative safety of consumer products;
>
> (3) to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations; and
>
> (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

15 U. S. C. § 2051(b) (Supp. V 1975).

II. Background

The background of the present impasse is extensive and, in some respects, complex. In March 1974 the Commission issued a public notice [2] announcing that it would hold a public hearing to investigate hazards encountered during operation of television receivers and to consider the necessity of developing safety standards for such receivers. In the notice the Commission requested certain technical information and data on television-related accidents from manufacturers of television sets and component parts. In particular the Commission requested that the manufacturers submit all accident reports collected since the National Commission on Product Safety held hearings on the subject in 1969.[3] Although a few manufacturers complied with the Commission's request, the principal response consisted of a six-page summary of accident data supplied by the Electronics Industry Association (EIA).

After reviewing the data voluntarily submitted, the Commission concluded that the "information submitted to the Commission by the EIA on behalf of the [companies did] not satisfy the Commission's request."[4] Accordingly, on May 13, 1974 the Commission, acting pursuant to 15 U. S. C. § 2076(b)(1) (Supp. V 1975), sent special orders to 25 manufacturers seeking specified information.[5] In the cover letter accompanying the special orders the Commission noted the possibility of a request for public access to this information via the FOIA, and the manu-

---

2. 39 Fed. Reg. 10929 (March 22, 1974).

3. *Id.*

4. *E.g.*, Special Order of the Commission to General Electric Company, Docket Item 11A, Ex. A-1, in Civil Action (CA) No. 75-136 (D. Del.).

5. Of the appellee manufacturers here, apparently only RCA did not receive a special order. *GTE Sylvania Inc. v. Consumer Product Safety Com'n*, 404 F. Supp. 352, 358 n. 11 (D. Del. 1975).

facturers were instructed to identify data claimed to be exempt from public disclosure and to substantiate any such claims. Claims of confidentiality accompanied the responses of most manufacturers. Again the Commission reviewed the submitted data and again the Commission found that certain of the manufacturers had not complied with the request. Thus on July 26, 1974 supoenas [sic] *duces tecum* were issued to the appellee manufacturers and three other manufacturers [6] requiring production of specified technical information and all television-related accident data.

Appellants' first request for access, under the FOIA, to data submitted by the manufacturers was in June 1974 and pertained to the documents submitted in response to the Commission's special orders of the previous month.[7] Although appellants were given access to those reports for which confidentiality was not claimed by the manufacturers, they were not allowed access to documents which the manufacturers claimed were exempt from the FOIA.[8] Instead, in August 1974 the Commission informed the manufacturers of appellants' FOIA request and again directed the manufacturers to substantiate their claims of confidentiality. The Commission also extended appellants' FOIA request to the additional data which the Commission later subpoenaed from the manufacturers.[9]

6. Sony Corporation, Sanyo Electric, Inc., and Wells-Gardner Electronics Corporation were subpoenaed but did not seek to bar public disclosure of data they forwarded to the Commission. Evidently the Commission did not order all manufacturers of television sets sold in this country to submit accident reports. *GTE Sylvania Inc. v. Consumer Product Safety Com'n, supra* note 5, 404 F. Supp. at 359 n. 18.

7. *Consumers Union of United States v. Consumer Product Safety Com'n,* 400 F. Supp. 848, 850 (D. D. C. 1975).

8. *Id.*

9. *Id.*

Appellants subsequently limited their request to exclude documents protected by the attorney-client privilege or the work product doctrine and those portions of documents that contained names and addresses of accident victims. Even with this limitation, however, appellants' request went unfulfilled.[10] In October 1974, therefore, four months after their initial request, appellants informed the Commission that they would consider any further delay to be a denial. As a result of that communication, representatives of appellants and the Commission met in November 1974 and agreed upon a timetable for completion of the Commission's review of the manufacturers' submissions. It was estimated that the Commission's legal determination as to availability of the requested documents would be completed by mid-March of 1975. Appellants acquiesced in that timetable, but expressly reserved the right to consider additional delay as a denial of their request.[11]

On March 28, 1975—nine months after appellants' initial request—the Commission issued its legal determination that the documents requested by appellants did not fall within the exemptions of the FOIA. It also stated that, even if the data were exempt from mandatory disclosure, disclosure by the Commission was nonetheless within its discretion and, in this case, appropriate in the interest of public health and safety.[12] The Commission subsequently notified the television manufacturers of its decision to release the requested documents on May 1, 1975. After receiving that notice, seven of the manufacturers filed separate actions against the Commission in the United States District Court for the District of Delaware,

10. *Id.*

11. *Id.*

12. *Id.*

each seeking an injunction prohibiting disclosure on the ground that release of the documents is barred by the exemptions to the FOIA and certain portions of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (Supp. V 1975).[13] Five other television manufacturers filed similar separate actions in the United States District Court for the Southern District of New York,[14] the United States District Court for the Northern District of New York,[15] and the United States District Court for the Western District of Pennsylvania.[16] In all of the actions the manufacturers applied for temporary restraining orders prohibiting release of the documents pending determination of their motions for preliminary injunctions. The Commission consented to the temporary restraining orders in at least some of the cases.[17] Subsequently the individual actions filed by the television manufacturers were consolidated in the District of Delaware.[18] Even though

13. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (CA No. 75-104), RCA (CA No. 75-108), Magnavox (CA No. 75-112), Zenith (CA No. 75-113), Motorola (CA No. 75-114), Warwick (CA No. 75-115), and Aeronutronic Ford (CA No. 75-116).

14. Matushita (CA No. 75-2040), Sharp (CA No. 75-2049), and Toshiba (CA No. 75-2050) filed actions in the Southern District of New York.

15. General Electric (75-CV-189) filed suit in the Northern District of New York.

16. Admiral (CA No. 75-531) filed suit in the Western District of Pennsylvania.

17. Appellants claimed below that the Commission consented to the orders in all of the cases, while the Commission claimed it consented to some but not all of the orders. For purposes of the motion to dismiss, the District Court below accepted appellants' allegations as true. Memorandum Opinion, *supra* note 7, at 5. Because our disposition on appeal does not turn on the number of orders that the Commission consented to, we do not feel it necessary to resolve the issue here or to remand it to the District Court.

18. *GTE Sylvania Inc. v. Consumer Product Safety Com'n*, *supra* note 5.

Rule 65(b) of the Federal Rules of Civil Procedure has been held to limit the duration of temporary restraining orders to a total of 20 days, absent consent by the party against whom the order was directed, *Sims v. Greene*, 160 F. 2d 512, 516 (3d Cir. 1947), the Commission did not object to requests for further extensions of the temporary restraining orders, with the result that oral argument on the manufacturers' preliminary injunction motions was not heard until July 23, and the stays against the Commission's releasing the information continued until those motions were decided. A preliminary injunction, which the Commission did oppose, was entered on October 23, 1975, prohibiting production of the data.[19] For whatever reason, the appellants did not seek to intervene in this action either to contest the manufacturers in Delaware or to have the action transferred to the District of Columbia. And despite full awareness of appellants' requests for access to the documents, neither the manufacturers nor the Commission even attempted to include appellants as parties or to transfer the cases to the District of Columbia where appellants could readily be joined. Furthermore, though the submissions by the Commission in Delaware plainly put that court on notice of the interest of appellants in release of the documents, the court did not on its own motion inquire about the necessity of joining appellants under Rule 19, FED. R. CIV. P.

After the District Court for the District of Delaware entered the preliminary injunction, the Commission filed an interlocutory appeal. The Commission subsequently filed a voluntary motion for dismissal of the appeal, however, and on May 10, 1976 the motion was granted.[20]

19. *Id.*

20. The Commission's motion is on file with the clerk of the Third Circuit, Docket Nos. 76-1095–76-1107.

On August 20, 1976 the District Court "closed out" the case with no further action planned.

III. The Decision Below

The instant FOIA litigation was filed in the District Court for the District of Columbia on May 5, 1975 and appellants promptly moved for summary judgment. The Commission and the manufacturers, however, moved to dismiss this action on the ground that no case or controversy existed between appellants and the Commission or, in the alternative, to stay the proceedings pending the decision in Delaware.

Four months later and 15 months after appellants initially asked the Commission for access to the documents, the District Court, without oral argument, filed an opinion and entered an order dismissing the action.[21] The District Court concluded that between appellants and the Commission there was no case or controversy since "on the crucial issue in this case"—the claim that the documents are subject to mandatory disclosure under the FOIA—appellants and the Commission "came to the exact same conclusion": that the documents had to be disclosed.[22] The only reason the Commission was not disclosing the documents, according to the court, was that it was prevented from doing so—first by the several temporary restraining orders and then by the preliminary injunction issued by the District Court for the District of Delaware. The court further concluded that, between

21. *Consumers Union of United States v. Consumer Product Safety Com'n, supra* note 7.

22. *Id.*, 400 F. Supp. at 851. This most definitely is not, however, "a situation in which [the Government] confesses error and represents that the error will be corrected without need for further court action." *Goosby v. Osser*, 409 U. S. 512, 516 n. 4 (1973), and cases cited therein.

appellants and the manufacturers, there was a failure to state a claim upon which relief could be granted.[23]

IV. The Issues on Appeal

We conclude that the District Court erred, and that there is a case or controversy[24] between appellants and the Commission. At its narrowest compass the case or controversy to be resolved concerns the threshold question of the scope and effect of the proceedings in Delaware. The Commission, echoed by the manufacturers, renews on appeal its argument—accepted by the District Court—that, although it would like to provide appellants with the requested documents, the preliminary injunction entered by the Delaware District Court unequivocally precludes it from doing so. Appellants disagree and deny that the preliminary injunction entered in Delaware absolves the Commission of what they believe is the Commission's statutory duty to furnish the requested documents.

This substantial and extensively argued disagreement among the parties to this action fully satisfies the Article III case or controversy requirement.[25] The scope and

23. *Consumers Union of United States v. Consumer Product Safety Com'n, supra* note 7, 400 F. Supp. at 853.

24. "The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." *In re Pacific Railway Commission*, 32 F. 241, 255 (Circuit Court, N. D. Cal. 1887) (Field, Cir. J.), *quoted in Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 239 (1937).

25. In his opinion in *Aetna Life Ins. Co. v. Haworth, supra* note 24, Chief Justice Hughes provided a now classic explanation of the requirement:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot.

effect of a prior judgment are always legitimate subjects of argument and resolution in a subsequent action,[26] and the judgment entered by the Delaware District Court suggests no reason why it should be considered an exception.

Moreover, the Commission's conduct of the Delaware litigation provides a second, independent reason for rejecting appellees' contention that a case or controversy is lacking. In fact, reviewing both the administrative and litigational prelude to the instant appeal, the Commission's conduct, in several instances, is not easily reconcilable with its ostensible acceptance of appellants' argument that the requested documents should be disclosed.[27] On

25. (Cont'd.)
The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. • • •
300 U. S. at 240-241 (citations omitted).

26. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 1, 1973); Advisory Committee Note, 39 F. R. D. 69, 106 (1966), *citing* RESTATEMENT OF JUDGMENTS § 68, comment (h), § 116 (1942); F. JAMES, CIVIL PROCEDURE § 11.5, at 534-535 (1965); 1B J. MOORE, FEDERAL PRACTICE ¶ 0.441[1] at 3772-3773 (Moore & Currier ed. 1974), *quoting Cromwell v. County of Sac*, 94 U. S. (4 Otto) 351, 352-353 (1877). *See also, e.g., Hansberry v. Lee*, 311 U. S. 32, 40-41 (1940); *Gonzales v. Cassidy*, 474 F. 2d 67, 72 (5th Cir. 1973); *Research Corp. v. Edward J. Funk & Sons, Co.*, 15 F. R. Serv. 2d 580 (N. D. Ind. 1971).

We take it to be established beyond cavil that, "[i]nsofar as the • • • judge may have rested his finding of the absence of a case or controversy on the alleged difficulty of formulating a remedy, he also erred." *Goosby v. Osser, supra* note 22, 409 U. S. at 517 n. 5, *citing Louisiana v. United States*, 380 U. S. 145, 154 (1965); *Brown v. Board of Education*, 349 U. S. 294, 300 (1955).

27. For example, despite the time limits imposed on agencies which receive FOIA requests, 5 U. S. C. § 552(6) (1970), the Commission took nine months from the date of appellants' initial request

the basis of this record, we cannot believe that the Commission and the appellants lack the degree of adverseness necessary under the Constitution.

The existence of a case or controversy having been established, we must next consider its merits. That is, we

27. (Cont'd.)
for the documents to issue its determination that the documents could legally be released. *See* p. 7 *supra*. Even more "curious" (to borrow the description of the District Court below) is the fact that the Commission, "having just completed a nine-month legal investigation which led to the conclusion that the documents were available under the FOIA, failed to make even a *pro forma* opposition to the motions for restraining order." *Consumers Union of United States v. Consumer Product Safety Com'n, supra* note 7, 400 F. Supp. at 852. Also, as noted above, the Commission did not object to requests for further extensions. *See* p. 8 *supra*.

It is true that the temporary restraining orders were eventually replaced by a preliminary injunction, issuance of which was contested by the Commission. But it is the aftermath of the issuance of this preliminary injunction that constitutes perhaps the most disturbing aspect of the procedural history of this dispute. The Commission initially adopted the quite logical tack of filing an interlocutory appeal from the preliminary injunction. As recounted above, however, soon after filing the appeal *the Commission itself* filed a motion to have the appeal dismissed, and this motion was granted. *See* p. 9 *supra*. Since that time the Commission has evidently made not a single effort to have the District Court take any further action on the case or to have the Third Circuit consider on appeal the District Court's grant of the preliminary injunction. (We particularly stress the Commission's failure to pursue an appeal and its general inaction since the preliminary injunction was granted because these are uncontested facts that, obviously, were not before the District Court when it entered the order from which this appeal is taken.)

In large part, therefore, the prolonged delay and current legal stalemate in this dispute can be attributed to the Commission's inaction. Of course, absent lack of candor or other trifling with the court by the parties, questionable and even clearly incorrect civil litigation strategy is ordinarily beyond the concern of an appellate court. *See, eg., Link v. Wabash R. Co.*, 370 U. S. 626, 633-634 (1962). However, the special nature of the manufacturers' suit in Delaware and its possible effect on Consumers Union and other potential FOIA plaintiffs require this court to pay closer than usual heed to the general background of this dispute and to the overall conduct of the parties.

must consider whether the Commission and the manufacturers or, alternatively, the appellants are correct in their assessment of the legal effect on this action of the Delaware judgment. At first glance appellees' position seems strong. The Delaware District Court preliminarily enjoined the Commission from releasing the contested documents, and that injunction has not been modified in any manner. It would thus appear that appellants' request may indeed be foreclosed.

Yet the correctness of this conclusion, toward which the Commission and the manufacturers urge us so enthusiastically, is not nearly as obvious as they would have us believe. The procedural history of the Delaware proceeding—as adduced by the District Court, as well as in the appellate briefs and at oral argument—is troubling and belies the apparent soundness of appellees' position. There is, first, the obvious and important fact that the Delaware District Court never did resolve the merits of the manufacturers' claim that the contested documents should not be released. Rather, the court limited itself to preliminary enjoining the Commsision from releasing the documents in dispute.[28] The opinion accompanying the injunctive order unmistakably confined itself to the propriety of relief *pendente lite*.[29] An order of that type is only "a conservative measure intended ° ° ° to save all rights until the merits of the controversy can be definitely ascertained ° ° °. It is not an adjudication of rights in any proper sense of the term ° ° ° [and] it does not follow that the

28. *GTE Sylvania, Inc. v. Consumer Product Safety Com'n, supra* note 5, 404 F. Supp. at 375.

29. The Delaware court found that irreparable harm would attend disclosure of the documents, 404 F. Supp. at 375, and that the manufacturers had presented a "*prima facie* case showing a reasonable probability" that divulgence would be unlawful. *Id.* at 369, *quoting Oburn v. Shapp*, 521 F. 2d 142, 148 (3d Cir. 1975).

final adjudication will be in accordance with the interlocutory order." [30]

Standing alone the preliminary injunction, despite its impact on the agency, could not bar the FOIA action instituted by appellants in the District of Columbia. It would, of course, weigh heavily in any decision as to which of the two suits ought, "giving regard to conservation of judicial resources and comprehensive disposition of litigation," [31] to be stayed or enjoined pending the outcome of the other.[32] Here, however, there is no occasion to engage in the balancing that would ordinarily attend such a situation, for nearly a year after entry of the preliminary injunction the Delaware court entered an order "closing out" the case with no further action planned.

While the "close-out" language employed by the Delaware court finds no parallel in either that court's rules or the Federal Rules of Civil Procedures [sic], it does evince an understanding—apparently shared by the parties before it—that the suit had run its course. No one implies that any intervening determination on the merits has converted the interlocutory relief into a permanent injunction; [33] such

30. *United States Electric Lighting Co. v. Metropolitan Club*, 6 App. D. C. 536, 544 (1895). *Accord, Public Service Com'n v. Wisconsin Telephone Co.*, 289 U. S. 67, 70 (1933); *Industrial Bank of Washington v. Tobriner*, 405 F. 2d 1321, 1324 (D. C. Cir. 1968).

31. *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183 (1952). *Cf. Columbia Plaza Corp. v. Security National Bank*, 525 F. 2d 620, 627 (D. C. Cir. 1975). *See also Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817 (1976), and cases cited therein; 2 J. MOORE, FEDERAL PRACTICE ¶ 3.06[2] at 736-739 (Moore & Lucas ed. 1975).

32. *See, e.g., Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., supra* note 31, 342 U. S. at 183-184; *Columbia Plaza Corp. v. Security National Bank, supra* note 31, 525 F. 2d at 627-628.

33. Neither does anyone contend that the hearing on preliminary relief was *sub silentio* consolidated with a hearing on the merits. See Rule 65(a)(2), FED. R. CIV. P. In view of the strictures placed upon such a practice, that is not surprising. *See, e.g.,*

other possible interpretations of the Delaware court's order as suggest themselves tend toward the conclusion that, although the reverse FOIA action was not dismissed in form, it was dismissed in fact, and by acquiescence of the parties the matter was dropped.

With that, the preliminary injunction is dead.[34] When there is no prospect of an adjudication of the merits, relief that purports to be temporary, pending such an adjudication, is obviously superfluous. Whether this "closing out" acknowledges an informal—or even tacit— "settlement" between the Delaware plaintiffs and the Commission we need not inquire, since if it did such a settlement would be void as against public policy.[35] Thus the preliminary injunction need hardly be considered an insuperable barrier to the suit at bar.

Besides the absence of a disposition on the merits, the Commission's conduct of the Delaware litigation is a second factor that makes us reluctant to accept, without more,

33. (Cont'd.)
Brooks v. Nacrelli, 415 F. 2d 272, 275 (3d Cir. 1969), *on remand*, 331 F. Supp. 1350 (E. D. Pa. 1971), *aff'd*, 473 F. 2d 955 (3d Cir. 1973); *Willits v. Richardson*, 497 F. 2d 240, 244 (5th Cir. 1974); *Pughsley v. 3750 Lake Shore Drive Cooperative Building*, 463 F. 2d 1055, 1057 (7th Cir. 1972); *Dry Creek Lodge, Inc. v. United States*, 515 F. 2d 926, 935 (10th Cir. 1975). *But cf. Fenstermacher v. Philadelphia National Bank*, 493 F. 2d 333, 337 (3d Cir. 1974); *Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F. 2d 1096, 1106 (5th Cir. 1972).

34. *See, e.g., Wickes Corp. v. Industrial Financial Corp.*, 493 F. 2d 1173, 1176 (5th Cir. 1974); *Rio Hondo Harvesting Corp. v. Johnson*, 293 F. 2d 426, 427 (5th Cir. 1961); *Heasley v. United States*, 312 F. 2d 641, 648-649 (8th Cir. 1963); *Sweeney v. Hanley*, 126 F. 97, 99 (9th Cir. 1903), *cert. denied*, 193 U. S. 671 (1904). *Cf.* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 at 427 (1973); 7 J. MOORE, FEDERAL PRACTICE ¶ 65.07 at 65-86 (Moore & Lucas ed. 1975). *See also United States v. Professional Air Traffic Controllers Organization*, 449 F. 2d 1299, 1300 (3d Cir. 1971).

35. *Cf. Petkas v. Staats*, 501 F. 2d 887 (D. C. Cir. 1974).

the contention that the Delaware proceedings preclude appellants' suit here. As described above,[36] the Commission was, in several respects, less than vigilant in espousing its putative view that the requested documents should be disclosed.

Yet another, related reason for declining to give the Delaware judgment the preemptive effect that appellees argue it deserves is the absence from the Delaware proceedings of any party requesting disclosure. Not only were the appellants in this case not participants in that suit, neither was any other private party besides the manufacturers. Given the Government's peculiar approach to those proceedings, therefore, the pro-disclosure position was all but unrepresented. This important consideration further attenuates any claim that the preliminary injunction is binding on appellants here.

V. CONCLUSION

Accordingly, we remand this case to the District Court for the District of Columbia.[37] The issue on remand will be, quite simply, whether or not the documents should in fact be disclosed. In resolving this issue the District Court for the District of Columbia offers a peculiarly appropriate forum. The party that possesses the requested information (*i.e.*, the Commission), the parties that requested the information (Consumers Union and Public

36. *See* pp. 12-13 & note 27 *supra*.

37. Jurisdiction in the District Court is predicated on 5 U. S. C. § 552(a)(4)(B) (Supp. V 1975), which provides that under the FOIA:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant. • • •

Citizens), and the parties that supplied the information (the manufacturers) are all joined in the suit and are ready to present their respective views on the merits. We find no constitutional or procedural bar to adjudication.

Reversed and remanded.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

JOINT PETITION OF DEFENDANTS-APPELLEES AERONUTRONIC FORD CORPORATION, GTE SYLVANIA INCORPORATED, THE MAGNAVOX COMPANY, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, TOSHIBA-AMERICA, INC., AND ZENITH RADIO CORPORATION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Defendants-Appellees Aeronutronic Ford Corporation (now Ford Aerospace & Communications Corporation by change of name effective December 1, 1976), GTE Sylvania Incorporated, The Magnavox Company, Matsushita Electric Corporation of America, Toshiba-America, Inc., and Zenith Radio Corporation hereby petition for rehearing, and suggest the appropriateness of rehearing *en banc*, of the decision in this case filed July 5, 1977.

I. Concise Statement of Issue and Its Importance.

Whether it is proper for this Court to create a "case or controversy" that does not exist by erroneously con-

cluding that a preliminary injunction issued by the United States District Court for the District of Delaware is no longer outstanding, a position espoused by no party, in disregard of normal principles of comity and sound administration of justice. Whether it is proper to reach this conclusion, which in effect attempts to vacate an injunction of a district court in another circuit, on the basis of an administrative order entered by the Delaware court solely for statistical purposes, without having in the record the text of the administrative order or any other evidence in the record pertaining to the purpose and effect of the administrative order.

II. Statement of Case.

A. Procedural Summary.

The complaint in this case was filed on May 5, 1975 by Consumers Union of the United States, Inc., and Public Citizen's Health Research Group ("plaintiffs") seeking an order directing the Consumer Product Safety Commission ("CPSC") to disclose under the Freedom of Information Act ("FOIA") approximately 120,000 pages of "TV-related accident data" obtained by the CPSC from a number of television manufacturers. Twelve manufacturers were joined with the CPSC as defendants. On September 5, 1975, Judge Richey granted motions by the defendants to dismiss. As to the CPSC, he held that the complaint presented no "case or controversy", and as to the manufacturers, he held that the complaint failed to state a claim upon which relief could be granted. An appeal of Judge Richey's order of dismissal followed and on July 5, 1977, a panel of this Court reversed Judge Richey's order.

B. Factual Background.

On March 28, 1975, the CPSC announced that it would release certain documents requested by the plaintiffs under the FOIA. These documents, which had been submitted to the CPSC by the appellee manufacturers, contained data concerning television related accidents. After receiving notice that the CPSC would release the requested documents, seven of the manufacturers filed separate actions against the CPSC in the United States District Court for the District of Delaware seeking to prohibit disclosure on the ground that release of the documents was barred by exemptions to the FOIA and certain portions of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (Supp. V 1975). Five other manufacturers filed similar actions in the United States District Court for the Southern District of New York, the United States District Court for the Northern District of New York, and the United States District Court for the Western District of Pennsylvania. In all the actions, the manufacturers obtained temporary restraining orders prohibiting release of the documents pending determination of their motions for preliminary injunction.[1] Subsequently, all of the indi-

1. Plaintiffs repeatedly emphasize that the CPSC did not oppose entry of these temporary restraining orders and agreed to their extension beyond the normal ten-day period. It is routine for governmental as well as private litigants to agree to the entry of temporary restraining orders without regard to the ten-day limitation period established by Rule 65(d) of the Federal Rules of Civil Procedure, in order that the merits of particular cases, including FOIA cases, can be resolved in an orderly fashion. *See, e.g.*, Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1248 (E. D. Va. 1974). Moreover, the propriety of the CPSC's decision not to oppose extension of the temporary restraining orders is no longer an issue in view of Judge Latchum's preliminary injunction of October 23, 1975 which was entered over the vigorous opposition of the CPSC.

vidual actions were consolidated by transfer to the District of Delaware before Chief Judge James L. Latchum.

Oral argument on the manufacturers' preliminary injunction motions was heard by Judge Latchum on July 23, 1975. The restraining orders against the CPSC's releasing the documents continued until October 23, 1975, when the court issued a preliminary injunction prohibiting disclosure of the data. Judge Latchum's order was supported by a reasoned and detailed 56-page opinion. 404 F. Supp. 352 (D. Del. 1975). After Judge Latchum entered the preliminary injunction, the CPSC filed an interlocutory appeal which subsequently was dismissed on its own motion.[2]

On August 20, 1976, Judge Latchum entered an order instructing the Clerk "to submit a JS-6 form to the Administrative Office and close these cases *for statistical purposes.*" (Emphasis supplied). The Order specifically noted that *"nothing contained herein shall be considered a dismissal or disposition of the matter."* (Emphasis supplied). (A copy of this Order can be found at pages A-1 through A-5 in the Appendix accompanying this petition.)[3]

Shortly after the commencement of the Delaware action, plaintiffs initiated the instant litigation in the United

2. While the reasons for this voluntary dismissal can best be stated by the CPSC, we cannot help but believe that this action speaks volumes as to the strength of our case on the merits—leading to frantic forum shopping by appellants and urgent searching for precedent in another pending case in the Western District of New York by the CPSC.

3. Since the panel felt that the status of the preliminary injunction in the Delaware District was the material out of which a "case or controversy" could be woven, we are surprised that the panel proceeded to "consider its merits" (Slip Op. p. 13). The panel did not have the Delaware District's order closing the case before it. If the accompanying Appendix serves no other purpose, we respectfully submit it does show why the panel after a summary hearing and without a record basis reached an erroneous conclusion as to the status of the Delaware case.

States District Court for the District of Columbia against the CPSC and the manufacturers. The complaint sought release of the documents which plaintiffs previously had requested under the FOIA and which were the subject of the Delaware action. Plaintiffs claimed that the CPSC's failure to release the requested documents constituted a violation of the CPSC's duty to promptly produce documents once it had decided that the documents should be released. The complaint noted that release of the requested materials already had been enjoined by Judge Latchum, but contrary to the panel's view, the complaint did not seek to litigate the validity or legal effect of the temporary restraining order. Recognizing that the CPSC agreed with plaintiffs' position that the documents should be released, but that the CPSC was prohibited from doing so by the Delaware restraining order, Judge Richey dismissed the complaint on the ground that no "case or controversy" existed between the CPSC and plaintiffs. 400 F. Supp. 848. The core of Judge Richey's ruling is set forth as follows.

> "At the heart of plaintiffs' claim is their contention that the documents are subject to mandatory disclosure under the FOIA. The defendant agency, however, came to the exact same conclusion in its above-mentioned formal finding on March 28, 1975. The CPSC and the plaintiffs thus stand in the same position on the crucial issue in this case."

400 F. Supp. at 851.

Moreover, Judge Richey recognized that considerations of deference and comity mandated that the plaintiffs' action be dismissed.

> "In essence, what the plaintiffs ask this Court to do in the instant case is re-determine whether the re-

straining orders obtained by the manufacturers in various federal district courts should have issued . . . . As the United States Court of Appeals for the District of Columbia Circuit has noted, 'in the interests of comity and the orderly administration of justice we should not attempt to reexamine . . . matters considered and resolved by . . . a court having authority equal to our own.' *Hilton Hotels Corp. v. Weaver*, 117 U. S. App. D. C. 83, 325 F. 2d 1010 (1963), *cert. denied*, 376 U. S. 951 (1964)."

400 F. Supp. at 853.[4]

III. Reasons for Granting Rehearing.

In reversing Judge Richey's order of dismissal, the panel proceeded under a complete misapprehension that the "close-out" order entered by Judge Latchum rendered the preliminary injunction "dead" and constituted a dismissal "in fact." The panel had not seen the "close-out" order which was not in the record and which was entered pursuant to a purely administrative-statistical practice in another circuit, a practice with which the panel was not familiar. This misapprehension was understandable since

4. Thus, the plaintiffs fell victim to their own strategy of forum shopping by consciously electing not to seek intervention as of right in the Delaware action under Rule 24(a). Their persistent avoidance of the Delaware forum, where the real action was occurring and rights were being determined, does not generate a case or controversy with the CPSC. Any prejudice suffered by plaintiffs can only be attributed to their reluctance to intervene in the Delaware action on the side of the CPSC. Moreover, Judge Richey's deference to the Delaware temporary restraining order has been fortified by Judge Latchum's issuance of a preliminary injunction (following a full hearing) after Judge Richey rendered his opinion. The courthouse door in Delaware remains open to the plaintiffs and we welcome their presence there and will interpose no obstacle to their participation.

the point was not briefed, and was decided without the benefit of any meaningful oral argument on the point. As can be readily ascertained from the order in the accompanying Appendix, the preliminary injunction continues in fact to be in full force and effect. Moreover, Judge Latchum on July 11, 1977, reaffirmed his intention that this injunction remain in effect.[5]

The linchpin [sic] of the panel's decision was its determination that the preliminary injunction was dead and that the Delaware action could be treated as having been dismissed. Therefore, in the panel's view, the Commission was voluntarily withholding the documents which gave rise to a "case or controversy" involving the plaintiffs.

Since the preliminary injunction in reality is still effective, there never was any basis for the panel's decision. The CPSC remains enjoined from releasing the requested documents and since the CPSC agrees with the plaintiffs that the documents are subject to disclosure, there is nothing left to adjudicate in this proceeding. The panel's misconception concerning the status of the Delaware preliminary injunction mandates a rehearing and affirmance of Judge Richey's decision that no "case or controversy" exists. The case in Delaware, which is going forward, con-

5. On July 11, 1977, the parties in the Delaware action met with Judge Latchum to discuss the meaning of his "close-out" order and the status of the preliminary injunction. As made clear by the transcript of that conference (see pages A-6 through A-22 of the Appendix), the preliminary injunction remains in effect.

"The Court: I am not going to tell you how to run your law suit. I feel that the Court of Appeals in the District of Columbia misconstrued the Order that was entered, the Minute Order, which had nothing to do with anything but statisticals, the case workload of this Court as outstanding cases for case load purposes. It didn't dispose of the case, it didn't dismiss the action, there was not substantive interference with the preliminary injunction that is outstanding and remains outstanding . . . ." (Transcript at 10-11; Appendix at A-18, A-19).

sequently provides a forum for a decision of the rights of all parties who want their rights adjudicated, and who are willing to abandon an effort to side-step an adverse preliminary, but careful, review of the controversy by a court coequal to the District Court for the District of Columbia.

IV. Reasons For Granting Rehearing En Banc.

The panel decision evidences a total disregard for the deference and comity to be accorded the Delaware preliminary injunction order, places the Commission in the position of facing possible conflicting orders, and misconstrues the "case or controversy" requirement of Article III of the Constitution.

(1) Considerations of Comity and Deference Mandate That This Court Respect the Order of the United States District Court for the District of Delaware and Dismiss This Action.

Fully aware that the United States District Court for the District of Delaware had issued a thoughtful and detailed 56-page opinion in support of its preliminary injunction barring disclosure of the same documents sought by plaintiffs in the District of Columbia, the panel proceeded to hold that Judge Richey, in essence, should redetermine the issues passed upon by Chief Judge Latchum, ignoring the possible conflict with the outstanding order.[6]

6. In holding that the District Court for the District of Columbia is a "peculiarly appropriate forum" for deciding the matter, the Court simply puts to one side the fact that if this case does present a "case or controversy", it could more appropriately be transferred to the jurisdiction where all other cases from various jurisdictions have already been consolidated. Why is a tribunal yet to examine the merits more appropriate than a court which has already extensively grappled with the issues? The plaintiffs can with the greatest of ease make their voices felt in the Delaware Court, if they question the capabilities or motives of the CPSC in defending its cause.

Such a holding flies in the face of the well-established principle that a district court as a matter of comity and orderly administration of justice should not attempt to interfere with an outstanding decree of another district court. *Hilton Hotels Corp. v. Weaver*, 117 U. S. App. D. C. 83, 325 F. 2d 1010 (1963), *cert. denied*, 376 U. S. 951 (1964); *Mann Manufacturing, Inc. v. Hortex, Inc.*, 439 F. 2d 403 (5th Cir. 1971) (Wilkey, J.); *Lapin v. Shulton, Inc.*, 333 F. 2d 169 (9th Cir.), *cert. denied*, 379 U. S. 904 (1964); *Gardner v. United States*, 13 F. 2d 851 (9th Cir. 1926); *Louisville & Nashville R. R. v. Western Union Telegraph Co.*, 233 F. 82 (5th Cir. 1916), *aff'd*, 250 U. S. 363 (1919); *United States v. Rabin*, 263 F. Supp. 989 (S. D. Fla. 1966); *Torquay Corp. v. Radio Corporation of America*, 2 F. Supp. 841 (S. D. N. Y. 1932). As noted by Judge Wilkey in *Mann Manufacturing, Inc. v. Hortex, Inc., supra*,

> "When a court is confronted with an action that would involve it in a serious interference with or usurpation of this continuing power [to modify injunctions], 'considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction * * * and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there." 439 F. 2d at 408, *quoting from Lapin v. Shulton, Inc.*, 333 F. 2d 169, 172 (9th Cir.), *cert. denied*, 379 U. S. 904 (1964).

Certainly the panel should not be inviting Judge Richey to set aside Chief Judge Latchum's decree.

(2) The Panel's Decision Has Placed the CPSC in the Dangerous Position of Possibly Being Confronted With Conflicting Orders By Two Co-Equal Courts.

Chief Judge Latchum has made it abundantly clear by his remarks on July 11, 1977 that his preliminary injunction order remains operative. The course upon which the panel has now asked Judge Richey to embark is to disregard that which has already been determined and which, in all likelihood, will finally be determined by the Delaware court. The panel is seeking nothing short of a confrontation between the jurisdictions. It is doing so in a lawsuit which was *not* filed to obtain an interpretation of Chief Judge Latchum's order, but to obtain access to certain documents. This was in a lawsuit against a party, the CPSC, which readily agrees that the plaintiffs should have access.

We respectfully submit that this panel should not sponsor such a possible conflict which would arise if Judge Richey on the merits should differ from Chief Judge Latchum. Instead, it should have been the purpose of this panel to avoid such a conflict by affirming the decision below, or directing Judge Richey that he either stay the proceeding or invite a motion to transfer the proceeding to the Delaware District. Of course, it is our position that in the circumstances of this case there is simply no "case or controversy" and that Judge Richey correctly assessed that the interest of justice would best be served by requiring plaintiffs to lodge their complaint in the same jurisdiction where all other cases involving this controversy have in due course come to be consolidated. It was in the same spirit of consolidation that the CPSC consented to the transfer of those cases which originated in other jurisdictions and which were in due course transferred to Delaware.

All that the plaintiffs have accomplished by insisting on their choice of forum has been an endless series of delays, including the delay before this Court. While we have no interest in defending the CPSC's diligence or strategy, certainly all must recognize that any ultimate delay in having this matter finally adjudicated cannot be placed at the doorstep of CPSC, to the exclusion of the plaintiffs-appellants.

(3) The Panel Decision Emasculates the "Case or Controversy" Requirement of Article III of the Constitution.

In its effort to provide the plaintiffs with the forum of their choice, the panel held that a "case or controversy" exists between the requesting party and an agency whenever an agency withholds documents *solely* because it has been enjoined from releasing the requested documents. The CPSC does not challenge the plaintiffs' right to obtain access to the documents. Plaintiffs, contrary to the panel's view, did not seek to challenge the validity or scope of the Delaware preliminary injunction.[7] Thus, there is no dispute between the parties involving any issue in this action, and the existence of the preliminary injunction cannot by itself create a case or controversy.[8]

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7. Nor does CPSC feel the injunction is "dead". Counsel for the Department of Justice, at a hearing before Judge Latchum on July 11, 1977 (see Transcript at p. 7; Appendix at A-15) stated:

> "The Order that came out of the Court of Appeals could conceivably be construed that the injunction is dead. We do not believe that your injunction is dead and we would just like to reassure you."

8. Plaintiffs' disagreement with the CPSC's litigation strategy in Delaware does not give rise to a "case or controversy." Moreover, the fact that the CPSC elected to not oppose entry of the temporary restraining orders is a moot point because the temporary restraining orders were replaced by a preliminary injunction on October 23, 1975, which was hotly contested by the CPSC. If plaintiffs believe that their interests are not adequately represented in Delaware, they simply should intervene as defendants in the Delaware action.

The contention that Judge Richey's decision deprives plaintiffs of their right to bring FOIA suits in the forum of their choice ignores the fact that this right extends only to cases and controversies. If plaintiffs-appellants had a dispute with the CPSC, they could file suit in the forum of their choice. Alternatively, they could intervene in a third party suit and move to transfer the action to another forum. It is the lack of adversity, not the pendency of the Delaware action, that deprives plaintiffs of the forum of their choice. It is the fact that plaintiffs-appellants have their real quarrel with what has happened in Delaware that makes that the proper forum for any proceeding.

Conclusion.

For the foregoing reasons, defendants-appellees petition the Court for a rehearing and suggest a rehearing *en banc*.

Respectfully submitted,

[Signatures of Counsel Deleted]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 75-2059

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CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

JOINT PETITION OF APPELLEES-ADMIRAL CORPORATION, GENERAL ELECTRIC CORPORATION, MOTOROLA, INC., SHARP ELECTRONICS CORP., TOSHIBA-AMERICA, INC., AND WARWICK ELECTRONICS, INC., FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, appellees respectfully petition this Court for a rehearing and suggest a rehearing *en banc* of the July 5, 1977, opinion and order by a three-judge panel of this Court (Bazelon, Chief Judge, and Wright and Robinson, Circuit Judges) reversing an opinion of the District Court, Charles R. Richey, D. J., holding that this proceeding should be dismissed for lack of a case or controversy. Because the panel's opinion was based upon erroneous facts and assumptions, neither in the record or briefs on appeal nor presented for review by appellants, this petition presents questions of exceptional importance to all litigants in this Circuit and elsewhere.

Concise Statement of Issues and Their Importance.

1. The decision of the panel virtually abolishes the "case or controversy" requirement since it holds that two parties, a plaintiff and a defendant, who are in fact in agreement, can burden the district court with litigation in order to attack a prior injunction (by a court of coordinate and co-equal jurisdiction) that binds one of the parties. Appellants-Consumers Union seek certain documents pursuant to the Freedom of Information Act ("FOIA") from appellee-Consumer Product Safety Commission ("CPSC"). The appellee-manufacturers, whose documents are at issue, contest appellants' right to receive such documents from the appellee-CPSC. The appellee-CPSC agrees with appellants that the documents should be turned over. However, appellee-CPSC claims that it is prohibited from producing the documents by the order of the United States District Court for Delaware (*GTE Sylvania v. Consumer Product Safety Commission*, No. 75-104, and cases consolidated therewith). The unique holding of the panel, which incorrectly ruled the Delaware court's injunction was dead and, therefore, a "case or controversy" existed, will burden the courts in the District of Columbia with litigation for many years.

2. In deciding there was a "case or controversy," the panel misconstrued the status of the litigation pending in the United States District Court for the District of Delaware (*GTE Sylvania v. Consumer Product Safety Commission, supra*).

The panel's decision relies upon facts wholly untrue and incorrect, which are neither in the record or briefs nor presented to the district court or this Court on appeal. The July 11, 1977, transcript of proceedings before the Delaware court, its Minute Order of August 20, 1977, and

the correspondence of the parties filed prior to entry of the Minute Order are tendered as Exhibits 1 and 2(a)-(m) [1] to conclusively establish:

(a) Contrary to the panel's characterization, the Delaware proceedings were not "dismissed in fact" nor was the court's preliminary injunction "dead"; and

(b) Contrary to the panel's conclusion, the agency has and is pursuing disclosure of these documents in Delaware.

3. If the panel intended to take judicial notice of the proceedings in Delaware, its conclusions concerning the status of that litigation were erroneous. If the panel intended to review and nullify the order of preliminary injunction entered by the Delaware court, it was without jurisdiction to do so. 28 U. S. C. § 1294 (1948); *see also Preston Corp. v. Raese*, 335 F. 2d 827 (4th Cir. 1964).

4. The panel erred in deciding issues not raised by the appellants. The appellants never challenged, or raised below or on appeal, the "scope and effect" of the Delaware court's preliminary injunction and, more importantly, conceded the Delaware court's injunction covered the identical set of documents requested in the court below.

5. The panel's holding that "the scope and effect of a prior judgment are always legitimate subjects of argument and resolution in a subsequent action" (Slip Op. at 11) is overly broad and incorrect. The effect of the panel's ruling on the "case of controversy" issue would hardly be "in the interests of comity and the orderly administration of justice." *Hilton Hotels Corp. v. Weaver*, 325 F. 2d 1010 (D. C. Cir. 1963), *cert. denied*, 376 U. S. 951 (1964).

1. Filed herewith as a Motion to Lodge Exhibits.

I. The Panel Erroneously Misconstrued the Status of the Delaware Litigation.

The panel's July 5, 1977, opinion misconstrued the status of the co-pending litigation in the United States District Court for the District of Delaware (*e.g., GTE Sylvania v. Consumer Product Safety Commission,* No. 75-104, and cases consolidated therewith).

The panel's finding that the Delaware litigation was "dismissed in fact," had "run its course," and that the preliminary injunction was "dead" (Slip Op. at 15-16) is erroneous and is based on material neither in the record nor briefs at the time of oral argument. Indeed, no party even raised or called into question whether the Delaware court's injunction was alive or dead.

The Delaware litigation, filed prior to the instant litigation, sought to enjoin the appellee-CPSC from the attempted release of documents submitted by the appellee-television manufacturers. The complaint alleged violations of the agency's own statutes and the Freedom of Information Act, among others. The CPSC consistently took the position that it could legally disclose the documents requested by appellants herein. The Delaware court, after discovery was taken, briefs were filed, and full oral argument, held the CPSC violated its own statute by failing to take reasonable steps to assure the accuracy of the data to be released. *GTE Sylvania v. Consumer Product Safety Commission,* 404 F. Supp. 352, 373 (D. Del. 1975). The court preliminarily enjoined the agency from releasing the documents in issue.

The panel's erroneous interpretation of the preliminary injunction apparently arises from a second Order of the Delaware court (dated August 20, 1977) which essentially placed the case on an inactive calendar, a procedure referred to in Delaware as closing the case for

"statistical purposes." This Order did not dismiss the case, as the panel erroneously found.

We submit that the panel's misunderstanding of the status of the Delaware procedure arises from the fact that neither the Delaware court's August 20 Order nor the correspondence setting forth the positions of the parties in regard to this Order was before the panel in the record or the briefs filed herein. Appellees have respectfully requested the Court to lodge these documents as exhibits in this proceeding. The documents show the following critical facts which were not before the panel:

(a) At the request of the Delaware court (inquiring about the status of the litigation), the television manufacturers stated that they had no objection to the case being closed *for statistical purposes only* if the injunction were to remain in effect until any party decided to reactivate the case. (Exhibits 2(c)-2(m).) The appellee-CPSC opposed the order and requested that the cases be maintained as pending cases. (Exhibit 2(b).) The CPSC further stated that it intended to resist entry of a permanent injunction on the ground that such relief was unwarranted. In addition, the appellee-CPSC requested no further proceedings until a decision was rendered in *Pierce & Stevens Chemical Corp. v. CPSC,* Civil No. 1975-410 (W. D. N. Y.) on the ground that a decision in that case would be relevant to the proceedings in Delaware.

(b) The August 20 Order specifically states that it is not to be considered "a dismissal or disposition" of the case. (Minute Order and correspondence submitted herewith as Exhibits 2(a)-(m).)

(c) The present status of the Delaware case is such that it is still alive and that the preliminary injunction

is still in effect. Submitted herewith, as Exhibit 1, is a transcript of pretrial proceedings before the Delaware court on July 11, 1977. As stated concisely by Judge Latchum:

> I feel that the Court of Appeals in the District of Columbia misconstrued the Order that was entered, the Minute Order, which had nothing to do with anything but statisticals, the case workload of this Court as outstanding cases for case load purposes. It didn't dispose of the case, it didn't dismiss the action, there was not substantive interference with the preliminary injunction that is outstanding and remains outstanding. . . . (Exh. 1, at 10-11.)

Thus, in reaching its conclusion on the "case or controversy" issue, the panel relied upon an erroneous assumption, *i.e.*, the Delaware proceedings were closed and the injunction was no longer in effect. We submit that this fact alone warrants a full reargument of this matter. If the present decision stands, it constitutes an improper and erroneous nullification of an order entered by the Delaware court, *i.e.*, a nullification that the panel was without jurisdiction to undertake. 28 U. S. C. § 1294 (1948); *see also Preston Corp. v. Raese*, 335 F. 2d 827 (4th Cir. 1964).

II. The Panel Reached an Erroneous Conclusion When It Found Absent From the Delaware Proceedings Any Party Requesting Disclosure.

Contrary to the panel's intimations, the appellee-CPSC has consistently taken a pro-disclosure position. On March 28, 1975, the CPSC reached its decision to release the documents requested by appellants. In both this litigation and in the Delaware litigation, the CPSC has continued to align itself with the appellants' position that they are entitled to the documents requested. (*See, e.g.*, Answer of CPSC, ¶ 13; Memorandum of CPSC filed in the Delaware proceedings referred to in Brief for Defendants-Appellees GTE Sylvania, *et al.*, at 14, n. 15.)

The panel was obviously unaware of this. Indeed, throughout the panel's opinion runs a strong implication that the CPSC and the Justice Department had not made any real effort to obtain disclosure of the documents in Delaware. In declining to give full effect to the Delaware court's order, the panel stated another reason for doing so was the "absence from the Delaware proceeding of any party requesting disclosure." (Slip Op. at 17.) We submit that such implied criticism of the government's strategy flies in the face of the panel's own statement that "questionable and even clearly incorrect civil litigation strategy is ordinarily beyond the concern of an appellate court." (Slip Op. at 13, n. 27.) More importantly, the facts (not before the panel nor in the record on appeal) show the agency adopted a strategy which, in their view, was calculated to lead to disclosure of the documents in the Delaware case.[1]

First, the CPSC opposed the Delaware court's attempt to close out the case for statistical purposes, as set forth *supra*. It was certainly not their fault that Judge Latchum did not accept their position. More importantly, the CPSC adopted what they believed to be a sound strategy

1. The panel also admonished the appellee-CPSC for taking "nine months from the date of the appellants' initial request" to determine the documents could be legally released, citing 5 U. S. C. § 552(6) (1970). We have been unable to find such a statute. If the panel meant to refer to 5 U. S. C. § 552(a)(6)(A), that statute was not effective until 90 days after enactment on November 21, 1974, and would not have applied to these proceedings. In any event, the Commission's review of over 120,000 documents could hardly be deemed to be dilatory, especially in view of the acquiescence of the Consumers Union (Slip Op. at 6-7, 12, n. 27).

for obtaining disclosure of the requested documents. After the CPSC was defeated in its efforts to prevent the Delaware court from issuing an injunction barring disclosure of the documents at issue, it decided it would be better to await a decision from another court (*Pierce & Stevens Chemical Corp. v. CPSC*, Civil No. 1975-410(W. D. N. Y.), instead of (a) continuing an appeal of the Delaware court's decision, or (b) requesting an immediate hearing on permanent injunction. What is wrong with this as a trial strategy? The CPSC had already lost in an extensive argument on the law pertaining to disclosure before Judge Latchum. While the appellee-television manufacturers disagree with the government's position on the importance of the litigation pending in the Western District of New York, it appears the CPSC made a rational strategic choice in view of the prior decision in the Delaware court.

In view of the CPSC's consistent pro-disclosure position in this and the Delaware litigation, it was clear error for the panel to hold no one represented the pro-disclosure position in the Delaware proceedings.

III. The Panel Decided Issues Neither Raised Below Nor on Appeal.

The panel's opinion concludes that a "case or controversy" exists whenever the "scope and effect of a prior judgment" are at issue. (Slip Op. at 11.) But this issue was not raised by any party. As discussed *supra*, the status of the Delaware litigation was raised *sua sponte* by the panel and characterized incorrectly.[1]

1. The panel's erroneous conclusions concerning the status of the litigation could be attributed, in part, to its refusal to permit counsel for the appellee-manufacturers an opportunity for meaningful oral argument. While this case was set down for oral argument on August 13, 1976, on the regular calendar, on September 9, 1976,

Nowhere in appellants' brief was there a contention that the "scope and effect" of the Delaware court's order was in issue. Appellants conceded their Freedom of Information Act request covered the *identical* set of documents which were the subject matter of the Delaware suit and which were enjoined from release by that court. While appellants did complain in this case that the appellee-CPSC "failed to fulfill its statutory duty" (Appellants' Brief at 10) in not releasing the requested documents, at no time did appellants contest the "scope and effect" of the prior injunction entered by the Delaware court.

Since appellants conceded the scope of the Delaware court's injunction covered the documents in issue, the panel should have confined its review to the issues presented below. *Brown v. Collins*, 402 F. 2d 209 (D. C. Cir. 1968); *Calhoun v. Freeman*, 316 F. 2d 386 (D. C. Cir. 1963); *Riley v. Titus*, 190 F. 2d 653 (D. C. Cir. 1951). *See also International Business Machines Corp. v. Edelstein*, 526 F. 2d 32 (2d Cir. 1975); *Pierre v. United States*, 525 F. 2d 933 (5th Cir. 1976); *Bannert v. American Can Co.*, 525 F. 2d 104 (6th Cir. 1975), *cert. denied*, 426 U. S. 942 (1976); *Associated Press v. Cook*, 513 F. 2d 1300 (10th Cir. 1975).

1. (Cont'd.)
it was transferred to the summary calendar. The government appellee was listed as the spokesman for all appellees, even though they took a position on disclosure adverse to that of all remaining appellees. A motion to allow more than one counsel to argue was denied by this Court on September 20, 1976. At the hearing, the spokesman for the government appellee was not the counsel who appeared in the Delaware litigation, nor was there any indication that counsel was aware of the actual status of that litigation. The panel refused permission to allow the appellee-television manufacturers any oral argument, except for the items not found in their briefs. Appellee-manufacturers could not and did not assume one of the central issues of this case, which was not even raised by appellants in their briefs, would be the status of the Delaware litigation.

IV. The Panel's Conclusion as to What Constitutes a "Case or Controversy" Is Overly Broad and Erroneous.

The panel's conclusion that "the scope and effect of a prior judgment are always legitimate subjects of argument and resolution in a subsequent action" (Slip Op. at 11) is overly broad and wrongfully sweeps within its ambit matters clearly inappropriate for subsequent review. Appellees submit that the power of one federal district court to review the prior judgment of another federal district court is not nearly as broad as the panel stated and that the court below was correct in dismissing the appellants' FOIA action.

The cases cited by the panel do not support its conclusions concerning the scope and effect of a prior judgment of a coordinate and co-equal court. *Cromwell v. County of Sac*, 94 U. S. (4 Otto), 351 (1877) (Slip Op. at 11 and n. 26) is a leading case on the distinctions between *res judicata* and collateral estoppel. The court in *Cromwell* held that a prior judgment was *res judicata* with respect to the claim or claims then at issue but would operate as an estoppel with respect to claims in subsequent actions different than those theretofore raised. In short, only those matters would be precluded that were previously at issue and adjudged. The court in *Cromwell* did *not* hold that a court has the power to generally review matters adjudicated by a court of equal jurisdiction; indeed, the court's pronouncement on *res judicata* suggests just the opposite.[1]

1. The panel's reliance on *Hansberry v. Lee*, 311 U. S. 32 (1940); *Gonzales v. Cassidy*, 474 F. 2d 67 (5th Cir. 1973); and *Research Corp. v. Edward J. Funk & Sons Co.*, 15 Fed. Rules Serv. 2d 580 (N. D. Ind. 1971), is similarly misplaced. These cases were limited to the narrow question of whether an earlier judgment in a class action case was binding on a party who subsequently claimed inadequate representation as a member of the class. It was concluded that the question of the adequacy of representation was susceptible of review. The appellee-manufacturers respectfully

As a rule of policy, this Court should avoid interfering with a prior order of a court of concurrent jurisdiction. This Court has enunciated the principle that should be followed in instances where a court is asked to review the prior judgment of a co-equal court. In *Texaco Inc. v. Hickel*, 437 F. 2d 636, 646 (D. C. Cir. 1970), the court[1] held:

> It is a sound and important policy in the administration of justice that what has already been done and determined not be redone and redetermined unnecessarily. This policy requires that courts not be niggardly in giving full effect to prior determinations of fact and right.

(*See also Mann Manufacturing, Inc. v. Hortex, Inc.*, 439 F. 2d 403 (5th Cir. 1971).)

That the panel would force the appellee-manufacturers to relitigate the identical issue (as to the CPSC's ability to release the documents in question) a second time in this forum is a state of affairs which hardly would be "in the interests of comity and the orderly administration

1. (Cont'd.)
submit that this narrow holding does not support the Court's sweeping statement that "the scope and effect of a prior judgment are *always* legitimate subjects of argument and resolution in a subsequent action."

1. Other courts have reached similar conclusions. *See United States v. Koenig*, 290 F. 2d 166, 172 (5th Cir. 1961) (it is certainly proper that, generally, one judge, in coordinate jurisdiction with another judge, should not overrule that other); *In re Persico*, 362 F. Supp. 713, 714 (E. D. N. Y. 1973) (judges of coordinate jurisdiction do not, except in the most extraordinary situations, have the function of reviewing each other's orders); *United States v. First Nat'l Bank & Trust Co.*, 263 F. Supp. 268, 270 (E. D. Ky. 1967) (that is the rule that where a judge has decided a question of law in one manner, a judge of coordinate jurisdiction should not normally undertake to decide it another way. This rule, based upon judicial comity as well as good judicial administration, is of great universality).

of justice." *Hilton Hotels Corp. v. Weaver,* 325 F. 2d 1010 (D. C. Cir. 1963), *cert. denied,* 376 U. S. 951 (1964). Therefore, the facts of this case clearly do not warrant the sweeping conclusion concerning the "scope and effect" of a prior judgment. For this additional reason, the panel's holding is overly broad and incorrect as a matter of law.

Conclusion.

This Court is urged to grant appellee-manufacturers' request for a rehearing and its suggestion that there be a rehearing *en banc.*

Respectfully submitted,

[Signatures of Counsel Deleted]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 75-2059

—

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

PETITION OF APPELLEE, RCA CORPORATION, FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, Appellee, RCA Corporation, hereby petitions for rehearing, and suggests the appropriateness of rehearing *en banc,* of the decision in this case filed on July 5, 1977 by a panel of this Court consisting of Chief Judge Bazelon and Judges Wright and Robinson.

Concise Statement of Issues and Their Importance.

1. The decision of the panel (written by Wright, J.) remands this case to the United States District Court for the District of Columbia with instructions to determine whether documents filed with the Consumer Product Safety Commission ("CPSC") by the television manufacturer defendants should be disclosed to appellants, despite the fact that the United States District Court for

the District of Delaware has already enjoined the CPSC from disclosing those documents. The decision of the panel was based in substantial part on a misapprehension of fact, namely an erroneous assumption that the Delaware action "had run its course" (Slip Op. p. 15) and that the injunction entered therein was, in the words of the panel, "dead" (Slip Op. p. 16). The fact is that the Delaware action has not run its course and that the injunction is very much alive.

The effect of the panel's remand of the action to the court below to determine "whether or not the documents should in fact be disclosed" is to set the court below on a collision course with the United States District Court for the District of Delaware. The important issue is whether this is the result intended by the panel, and if it is, whether such a result accords with principles of comity and the orderly administration of justice.

2. The panel concluded that, notwithstanding the fact that the CPSC was in total agreement with the plaintiffs on the ultimate question which the plaintiffs seek to have resolved in this case, *i.e.*, a determination that the documents in question should be disclosed to the plaintiffs, the case should be permitted to proceed in the court below with plaintiffs on one side and the CPSC on the other. This conclusion does violence to the fundamental constitutional requirement which limits jurisdiction of federal courts to actual cases or controversies between adverse parties.

Reasons for Granting Rehearing.

A. Background of the Appeal.

In 1974, the CPSC obtained certain "TV related accident reports" from various television manufacturers,

pursuant to requests and subpoenas. In April 1975, the CPSC advised the manufacturers that it had made a determination publicly to disclose the documents so obtained and certain compilations made therefrom. Thirteen manufacturers immediately brought suit against the CPSC to enjoin the threatened disclosure, on the grounds that disclosure would be in violation of various provisions of the Freedom of Information Act, the Consumer Product Safety Act and the Criminal Code. Temporary restraining orders were obtained by the manufacturers and the cases were consolidated in the United States District Court for the District of Delaware (where eight of the thirteen actions had been brought). Ultimately, Chief Judge Latchum of that court, after deposition discovery, the submission of extensive briefs, affidavits and argument, entered a preliminary injunction restraining the CPSC from disclosing the documents in question. A copy of the injunction entered by Chief Judge Latchum is Exhibit "A" to RCA's motion to lodge exhibits. The decision to enjoin was based on a lengthy well-reasoned opinion which is reported at 404 F. Supp. 352.

Meanwhile, after the actions by the manufacturers had been brought, the plaintiffs herein brought the instant action to compel CPSC to disclose to them the very same documents which CPSC had already decided to disclose and which were the subject of the actions instituted by the manufacturers.

Upon motion of the defendants, Judge Richey dismissed the action below on the ground that there was no case or controversy between plaintiffs and the CPSC since they were in agreement that the documents should be disclosed, that the plaintiffs were not seeking any relief from the manufacturers, and that considerations of judicial comity and the orderly administration of justice precluded

him from attempting to reexamine matters already ruled upon by Judge Latchum in Delaware.

B. The Decision of the Panel.

On July 5, 1977, a panel of this Court reversed and remanded the matter to Judge Richey with instructions to determine "whether or not the documents should in fact be disclosed." (Slip Op. p. 17).

1. The Panel's Erroneous "Case or Controversy" Conclusion.

The panel initially concluded that there was, in fact, a justiciable case or controversy between plaintiffs and the CPSC. The panel's opinion recited two grounds for this conclusion, namely (1) a disagreement between the plaintiffs and CPSC as to whether the injunction entered by Judge Latchum "absolves the Commission of what [the plaintiff's] believe is the Commission's statutory duty to furnish the requested documents" (Slip Op. p. 11) and (2) "the Commission's conduct of the Delaware litigation . . . is not easily reconcilable with its ostensible acceptance of appellants' argument that the requested documents should be disclosed." (Slip Op. p. 12).

The panel's first basis for finding a "case or controversy" goes too far. It would mean that whenever two persons with identical interests disagree with the judgment of a federal district court entered against one of them, they can bring a lawsuit in another federal district court to try to bring about a different result. One can be the plaintiff and the other the defendant in the second litigation. In fact, that is precisely what happened here. Instead of intervening in the ongoing Delaware actions, where the CPSC had temporarily been enjoined from doing what plaintiffs and the CPSC wanted to do, plaintiffs

brought the instant action in the District of Columbia (presumably a more favorable forum for them) against their ally, the CPSC. They asked that the CPSC be ordered to do precisely what it wanted to do, but what the other court had just enjoined it from doing. This is not a real controversy between the plaintiffs and the CPSC. It is just an end run around a ruling of another federal court.

The panel's second basis for finding a "case or controversy" is equally invalid. The panel questions whether CPSC really wants the same result as plaintiffs because, in the panel's view, the government adopted some questionable legal strategy in the Delaware action. Without any factual support, the panel has cast aspersions on the good faith of the CPSC and the Department of Justice in their handling of the Delaware litigation. The panel suspects that the government was fighting with a pillow in the Delaware action and was not really seriously opposing the manufacturers' efforts to block disclosure of the documents. There is absolutely no basis in the record in this case or anywhere else for such a conclusion. The fact is that the government vigorously opposed the manufacturers in the Delaware proceedings and forcefully advocated the "pro-disclosure" position. That the government lost the battle does not mean that it did not fight with all the vigor at its command.

The panel appears to have some questions about the trial strategy followed by the government in the Delaware action. There is nothing in this record on that point, except for the fact that the government agreed to the entry of some of the temporary restraining orders barring disclosure of the documents until the matter could be heard by the Delaware court. This is a weak reed upon which to base a challenge to the good faith of the government. We believe that the government agreed to the temporary restraining orders because it knew that the orders would

be routinely granted anyway, and because it properly felt that the manufacturers were entitled to a judicial determination as to whether the documents should be released. Obviously the whole matter would have become moot if the documents were released before the case could be heard.

The fact that the government has not requested that the Delaware action be set down for final hearing is no indication of improper handling of the action. The government may have concluded on the basis of the strong opinion by Judge Latchum that the handwriting was on the wall, and that if it promptly brought the matter to a final hearing in Delaware, the preliminary injunction would be made permanent. The best strategy from the government's standpoint, perhaps with the blessing of the plaintiffs in this case, may have been to permit the Delaware action to remain inactive and await a possibly more favorable ruling from some other court. For example, the government specifically advised Judge Latchum (by letter dated August 16, 1976) that it wanted the proceedings to be held in abeyance pending a ruling in a similar case pending in the Western District of New York.

If the existence of a "case or controversy" depends on the propriety of the strategy followed by the government in its handling of the Delaware action, then there ought to be an evidentiary hearing on that issue, or the parties should be requested to submit briefs relating to that issue. The court cannot simply assume that the government's strategy was improper.

We submit that it was clear error for the panel to find the requisite "case or controversy" in either a "dispute" over the meaning of Judge Latchum's order, or in the litigation strategy followed by the government in the Delaware action. What the panel is ordering to be tried in the district court and what the plaintiffs are seeking to

have tried in the district court is neither of these issues. According to the conclusion section of the panel's opinion "the issue on remand will be, quite simply, whether or not the documents should in fact be disclosed." On that issue, there is no case or controversy between the plaintiffs and CPSC. Both of them agree that the answer to the question is in the affirmative. They agree that the documents should be released. They "desire precisely the same result. . . . There is, therefore, no case or controversy within the meaning of Art. III of the Constitution." *Moore v. Charlotte-Mecklenburg Board of Education,* 402 U. S. 47, 48 (1971).

The fact that the manufacturers have interests adverse to the plaintiffs on this issue does not create a case or controversy between the plaintiffs and CPSC. Moreover, the statute under which the plaintiffs are suing (the Freedom of Information Act, "FOIA") is a statute under which relief may be obtained only against government agencies. In order for there to be a case or controversy in an FOIA case there must be genuine adversity between the plaintiffs and the governmental agency being sued on the fundamental question of whether the requested documents should be turned over to the plaintiffs. There is no such genuine adversity here and there never has been.

2. The Panel's Erroneous Assumption That the Delaware Lawsuit Had Run Its Course and That the Injunction Was Dead.

Having found the existence of a case or controversy, the panel then turned to what is called the "merits," and considered the legal effect on this action of the Delaware injunction. The panel determined that the Delaware injunction was no "insuperable barrier" to the suit at bar because of the panel's stated belief that the Delaware ac-

tion had "run its course" and been "dismissed in fact", and that Judge Latchum's "preliminary injunction is dead" (Slip Op. pp. 15-16). The panel had no basis upon which to predicate this belief and its understanding as to the status of the Delaware action is simply wrong.

There was no evidence before the panel as to the status of the proceedings in the District Court in Delaware. This matter was not the subject of any evidence in the record, of any argument in the briefs or of any but the most passing reference at oral argument. The panel's belief as to the status of the Delaware case, a belief which colors its whole opinion, was based on an erroneous impression of the facts pertaining to that litigation. The true status of the Delaware proceeding is summarized in the ensuing paragraphs and this summary is documented in the exhibits appended to RCA's motion to lodge exhibits.

The Delaware preliminary injunction was issued on October 23, 1975 (Exhibit A). By its terms the injunction was to remain in effect "until further order of the Court." On August 2, 1976, Chief Judge Latchum advised the parties by letter that unless the parties intended to request a hearing for permanent injunctive relief, the court intended to close the Delaware cases *for statistical purposes only*. By letter dated August 16, 1976, the government requested that the cases be maintained as pending cases but that further discovery and a further hearing be postponed until a decision issues in a case pending in the Western District of New York, which the government thought might ultimately resolve the issues pertinent to the Delaware cases (Exhibit B). RCA and other manufacturers responded to Judge Latchum's inquiry by letters stating that they had no objection to the cases being closed for statistical purposes provided that it was understood by all concerned that the preliminary injunction entered on

October 23, 1975 remained in effect (Exhibit B). Judge Latchum then issued a "Minute Order" on August 20, 1976 instructing the clerk "to submit a JS-6 form to the Administrative Office and close these cases for statistical purposes" (Exhibit C). The Minute Order further provided:

> "Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered."

It was clear to all of the parties in the Delaware cases that the preliminary injunction remained in effect and it was equally clear to Judge Latchum. Judge Latchum's understanding in this respect was reaffirmed last week when the parties to the Delaware cases met with him and discussed the panel's opinion and its implications (Exhibit D). At that conference, held on July 11, 1977, Judge Latchum stated (at pages 10-11):

> "I feel that the Court of Appeals in the District of Columbia misconstrued the Order that was entered, the Minute Order, which had nothing to do with anything but statisticals [Judge Latchum really said "statistics"], the case workload of this Court as outstanding cases for case load purposes. It didn't dispose of the case, it didn't dismiss the action, there was not substantive interference with the preliminary injunction that is outstanding and remains outstanding . . . . "

At the conference, Judge Latchum advised the parties (p. 12) that he had a clear calendar and that he would put the matter down for hearing on final injunction if any of the parties moved for such a hearing. On July 13, 1977 the manufacturers moved Judge Latchum to make the pre-

liminary injunction permanent and to set the matter down for hearing at the earliest possible date for that purpose (Exhibit E). On July 15, 1977, Judge Latchum entered an order setting the cases down for trial on September 12, 1977 (Exhibit F).

The panel's erroneous assumption that the Delaware action had "run its course" and had been "dismissed in fact" and that Judge Latchum's injunction was "dead" could only have resulted from the fact that the foregoing facts were not before the panel.[1] We are confident, therefore, that the panel will desire to reconsider this decision and to grant reargument.

3. If the Case Is to Be Remanded, the Remand Order Should Be Modified to Avoid a Collision Between the District of Columbia and Delaware Courts.

With the Delaware action and injunction being very much alive (contrary to the panel's erroneous assumption), the decision of the panel to send the case back to Judge Richey to determine "whether or not the documents should in fact be disclosed" (Slip Op. p. 17) sets Judge Richey on a potential collision course with Judge Latchum. Such a course would be completely inconsistent with fundamental principles of comity and sound judicial management. If the Court continues to believe that a case or controversy was presented below, we submit that in view of the live status of the Delaware action the order on remand should be quite different from that entered by the panel. An appropriate order would be one directing Judge Richey to stay further proceedings in the case before him pending final determination of the Delaware action. See

1. The developments demonstrated by Exhibits D, E and F have happened since the panel's decision. But they starkly demonstrate the panel's mistake in concluding that the Delaware litigation was finished.

e.g. *Hilton Hotels Corp. v. Weaver*, 325 F. 2d 1010 (D. C. Cir. 1963); *O'Hare International Bank v. Lambert*, 459 F. 2d 328, 331 (10th Cir. 1977); *Martin v. Graybar Electric Co.*, 266 F. 2d 202, 204 (7th Cir. 1959); *Carbon and Carbide C. Corp. v. United States I. Chemicals*, 140 F. 2d 47, 49 (4th Cir. 1944). If the Court is concerned as to whether the Delaware action will proceed with dispatch, the stay could be conditioned upon the parties proceeding in that manner. If the Court is concerned that the plaintiffs in this case are not parties to the Delaware action, it can suggest that the plaintiffs intervene in the Delaware action, and they have our assurance that we will not oppose any such intervention. If plaintiffs thereafter elect to continue their deliberate abstention from participation in the Delaware action, they have only themselves to blame.

Such a remand order by this Court will avoid the unseemliness inherent in two federal courts proceeding along potentially conflicting paths, and it will still protect the plaintiffs and permit the matter to continue in the court which has already gone past the preliminary injunction stage, has developed expertise on the subject, and is prepared to proceed promptly with a final hearing. At the very least the panel's order should be amended so as to permit Judge Richey to adopt such a course of action if the facts and circumstances presented to him indicate that such an approach is proper. To direct him simply to decide "whether or not the documents should in fact be disclosed" is we submit, highly improper under the circumstances.

Respectfully submitted,

[Signatures of Counsel Deleted]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 75-2059

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CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

FEDERAL APPELLEES' PETITION FOR REHEARING.

Pursuant to Rule 40, F. R. App. P., the federal appellees respectfully petition this Court to rehear the above-captioned case. The question presented in this case was whether a "case or controversy" existed between plaintiffs and the Consumer Product Safety Commission. The Court ruled that a "case or controversy" did exist, and remanded the matter to the district court to determine the merits of plaintiffs' FOIA claim. The Court's holding in large part turned on its conclusion that a preliminary injunction which had previously been issued in a reverse FOIA suit by the District Court for the District of Delaware was no longer of any binding effect. The Delaware injunction barred the Commission from disclosing any of the documents which plaintiffs sought in the instant action. This Court's conclusion that the injunction was no longer binding on the Commission rested on the Court's belief that the Delaware action had been "dismissed" by the Delaware

court pursuant to an order which "closed out" the case for statistical purposes. As we demonstrate below, the Delaware action has not been dismissed. To the contrary, a trial on the merits in that case has been scheduled for September 12, 1977.

Rehearing is essential in this case because the Court was not fully appraised of the status of the Delaware action when it reached its decision. That critical issue was not discussed by any of the parties in their briefs, and was only barely alluded to at oral argument. Rehearing, moreover, is critical to the government's interests, since this Court's opinion now raises the spectre that the government may be subject to inconsistent decrees by courts of equal jurisdiction. It is therefore critical that this Court reconsider its disposition of this case in light of the current, live status of the reverse FOIA suit in Delaware.[1]

I.

Facts.

The facts are fully set forth in the Court's opinion and therefore are only briefly summarized here. Plaintiffs, Consumers Union, et al., submitted a Freedom of Information Act request to the Commission on June 14, 1974, requesting copies of accident reports which had been submitted by 13 TV manufacturers. Some nine months later, the Commission, in accordance with a decision schedule agreed to by plaintiffs, and after carefully reviewing the reports, decided to release them to the requesters. Shortly thereafter the 13 TV manufacturers who had submitted the reports filed suit in various federal district courts to

1. The defendant manufacturers have filed a separate rehearing petition, with a suggestion for rehearing *en banc*. In our view, rehearing *en banc* is inappropriate since we feel that the panel which heard the case will desire to correct the points which it misapprehended.

enjoin their disclosure. These suits were eventually consolidated in the District Court for the District of Delaware which, on October 23, 1975, granted the manufacturers' request to preliminarily enjoin disclosure of the documents. See *GTE Sylvania, Inc. v. Consumer Product Safety Com'n.*, 404 F. Supp. 352 (D. Del., 1975). The instant FOIA cause of action, which was filed while the suits in the reverse cases were pending in the Delaware court, was dismissed for lack of jurisdiction on September 12, 1975. In Judge Richey's view, there was no case or controversy between plaintiffs and the CPSC since they were both in agreement that the documents should be released. Furthermore, the Court held, considerations of judicial comity and orderly administration of justice precluded the Court from re-examining orders issued by the Delaware district court.

On August 20, 1976, while plaintiffs' appeal from the order of dismissal was pending before this Court, Judge Latchum issued a Minute Order in the Delaware case instructing his clerk to "close these cases for statistical purposes." The order provided, however, that:

> Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered.

Accordingly on July 15, 1977, pursuant to a motion by the television manufacturers to make permanent the preliminary injunction, the Delaware court set a trial date of September 12, 1977 to determine the merits of the reverse FOIA suits.

The government has opposed the motion for a permanent injunction, and in addition, has filed a motion to

transfer the Delaware case to the District of Columbia on the grounds that the District of Columbia is a more convenient forum to resolve the issues in that case.[2]

II.

The Delaware Decree Is Not "Dead".

In reaching the conclusion that a case or controversy existed between Consumers Union and the CPSC, despite their agreement that the documents at issue should be released, the Court relied on the premise that "[t]he scope and effect of a prior judgment are always legitimate subjects of argument and resolution in a subsequent action." While the Court's statement may be true as a general proposition, it does not suffice to establish that a case or controversy exists in this case. To begin with, the rule that judgments are subject to being challenged in later actions only applies to final judgments; it does not apply to interlocutory decrees, over which the rendering courts have plenary control. 7 Moore, *Federal Practice*, ¶ 60.37[2], p. 627. Furthermore, even when final judgments are subject to collateral attack, the proper forum for raising such challenges is in the court where the original judgment was rendered. This is certainly the case with respect to Rule 60(b) motions, the normal avenue for challenging final judgments. It is equally true, however, when a third party challenge is brought to a final judgment by means of an independent action in equity.[3]

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2. The government has also asked the Delaware court to vacate its order fixing September 12, 1977 as the date for trial, principally on the grounds that the recent amendment of 5 U. S. C. 552(b)(3) has undermined the legal basis for the court's preliminary injunction order, and that this issue should be resolved before the parties commence discovery. We are filing a motion to lodge the pertinent documents in the Delaware action with this Court.

3. In *Torquay Corporation v. Radio Corporation of America*, 2 F. Supp. 841, 844 (S. D. N. Y., 1932), for example, the Torquay

Finally, and most importantly, even if plaintiffs theoretically had a right to bring a cause of action in the District of Columbia challenging the preliminary injunction issued by the District Court in Delaware, the fact is that plaintiffs never pleaded such a cause of action. Nowhere in their complaint did the plaintiffs challenge the validity of the Delaware court's decrees, and neither their Motion for Summary Reversal nor their brief on the merits mentions the issue. Indeed, it is quite evident that rather than contesting the issue, all the parties simply assumed that the Delaware decree continued to be binding on the government. Given this common understanding, shared by both plaintiffs and defendants, there clearly did not exist the kind of concrete adversariness with respect to this issue which is meant to insure that conflicting positions are fully briefed, and which underlies the constitutional requirement of a case or controversy. This case in fact presents a good example of the problems that can arise when a court attempts to decide issues which are not in dispute, and which therefore have not been briefed. As we demonstrate below, had the parties briefed the issue,

3. (Cont'd.)
Corporation brought an action in New York challenging a consent decree issued in Delaware on the grounds that the parties to the Delaware case had colluded in the action to the ultimate detriment of RCA and its stockholders, including Torquay. The New York district court refused to entertain the suit, ruling that

> as a matter of comity and of the orderly administration of justice, that this court should refuse to exercise its jurisdiction to interfere with the operation of a decree of another federal court. Especially is this so where it is clear that the United States District Court in Delaware would have jurisdiction of such a suit as is now before this court.

See also *Lapin v. Shulton*, 333 F. 2d 169, 172 (C. A. 9, 1964), certiorari denied, 379 U. S. 904 (1964), as well as this Court's own opinion in *Hilton Hotels Corp. v. Weaver*, 117 U. S. App. D. C. 83, 325 F. 2d 1010 (1963), certiorari denied, 372 U. S. 916 (1964), upon which Judge Richey relied.

this Court would not have come to the erroneous conclusion that the Delaware action had been dismissed.

On October 23, 1975 when the preliminary injunction was issued, the Delaware court specifically provided that it would remain in effect "pending final hearing and determination or until further order of the Court"[4] (Exh. A).[5] On August 20, 1976, when the court removed the case from its open docket "for statistical purposes," it specifically provided that:

> Nothing contained [in this order] shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered.

(Exh. C). Contrary to this Court's holding, this order does not reflect the parties' understanding that the case had run its course, and should therefore be dismissed. To the contrary, before entering the August 20 order, Judge Latchum specifically inquired of each party what its position was concerning the pending litigation, and the parties uniformly expressed their desire that the matter remain open. In the government's response to Judge Latchum, the government specifically stated that ". . . defendants request that the case be maintained as a pending case" (Exh. B). The government also informed the court of its intention to resist the entry of permanent injunctive relief, but requested that further hearings be delayed pending a de-

4. A preliminary injunction normally remains in effect until a final judgment is rendered, unless it expires earlier of its own terms, or is modified by the rendering court. Its duration will vary according to the needs of the situation in which it is used. See Wright & Miller, *Federal Practice and Procedure*, § 2947, pp. 426-27.

5. "Exh." refers to the exhibits to RCA's Petition for Rehearing.

cision in a related case, *Pierce and Stevens Chemical Corp. v. CPSC*, W. D. N. Y., Civil No. 1975-410[6] (*Id.*). The television manufacturers were equally clear that they would not consent to a dismissal of the action. In their responses to Judge Latchum, they stated that they had no objection to having the case removed from the open calendar "for statistical purposes", but only "so long as the preliminary injunction entered on October 23, 1975, remains in effect" (Exh. B). Finally, and most importantly, the Delaware court itself did not have any intention of dismissing the case, or of in any way altering the effect of its preliminary injunction. At a hearing that was held on July 11, 1977, Judge Lathcum specifically stated that in his view, this Court misconstrued his order.

> . . . [T]he Order that was entered, the Minute Order, . . . had nothing to do with anything but statisticals [sic], the case workload of this Court. . . . It didn't dispose of the case, it didn't dismiss the action, there was not substantive interference with the preliminary injunction that is outstanding and remains outstanding.

(Exh. D, pp. 10-11). The court further stated its position that, were government officials to disclose the documents that were subject to its injunction, the court would find

6. As we explain below, the government believed at that time that it had little chance of successfully resisting the television manufacturers' motion for permanent injunctive relief, given the legal opinions expressed by the district court in its September 12, 1975 memorandum opinion. It was believed that a favorable decision in *Pierce and Stevens* would substantially increase our chances of prevailing on the merits. It was for this reason that we requested that the hearing be deferred. We are informed that a decision in *Pierce and Stevens* is expected by the end of the summer. As noted above, *supra*, p. 4, n. 2, the legal situation today has been altered by the recent amendment to 5 U. S. C. 552(b)(3).

such officials in contempt and might well send them to jail (Exh. D, p. 5).[7]

It is clear then that, contrary to this Court's earlier impression, the Delaware action was not "dismissed in fact . . . by acquiescence of the parties." To the contrary, the action is very much alive, and a trial on the merits is in fact now scheduled for September 12, 1977. In view of this fact, there is a very real possibility that the government will be subject to inconsistent decrees and possible contempt orders if the District of Columbia action is permitted to proceed. As Judge Wilkey, sitting by designation, has stated, in such circumstances,

> considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction * * * and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there.

Mann Manufacturing, Inc. v. Hortex, 439 F. 2d 403, 407-408 (C. A. 5, 1971), citing *Lapin v. Shulton*, 333 F. 2d 169, 172 (C. A. 9, 1964), certiorari denied, 379 U. S. 904 (1964).

III.

The Government's Conduct of the Delaware Litigation.

This Court has suggested that the government's conduct of the Delaware litigation presents an additional basis

7. The July 11, 1971 hearing was of course held after this Court issued its decision, and the views of the Delaware court, as well as much of the documentary evidence contained in the Exhibits, is now before this Court for the first time. As we pointed out above, the reason this material was not developed in the parties' briefs was because there was no case or controversy concerning this question, since plaintiffs never placed in issue the validity of the Delaware decree.

for concluding that a case or controversy exists with the plaintiffs. It is quite clear, however, that absent allegations of fraud or collusion, which clearly were not made, plaintiffs' criticism of the government's litigation strategy is completely irrelevant. The final judgment of a federal court is not subject to challenge on the grounds that the case should have been litigated differently.[8] See Federal Rule of Civil Procedure 60(b); 7 Moore, *Federal Practice*, ¶ 60.37. Moreover, this Court's analysis of this question has incorrectly and unfairly cast serious aspersions upon the integrity and competence of the Commission and the government attorneys who defended the Delaware action. The Court should, in simple justice, delete these comments from its published opinion.[9]

The principal statements to which we take exception are those in which the Court suggests that the government was "less than vigilant in espousing its *putative* view that the requested documents should be disclosed," and that "the pro-disclosure position was all but unrepresented" (slip op., p. 17). To the contrary, the record reflects that the government was extremely vigorous in pressing its position that it should be permitted to release the accident reports. The primary obstacle to disclosing the reports was 15 U. S. C. 2055(b)(1), which provides that, before the Commission can make information public, it shall insure that the information is accurate, fair under the circumstances, and likely to further the goals of the Consumer Product Safety Act. Since it was indisputable that the documents which the Commission had collected (and which Consumers Union had requested) contained unverified accidents reports, the Commission had to demonstrate that the bar against disclosing inaccurate information was inapplicable.

8. As noted above, *supra*, pp. 4-5, judgments which are not yet final are not subject to challenge for any reason.

9. Numerous decisions held that the Due Process Clause of the U. S. Constitution requires that attorneys be given notice of charges and opportunity for an evidentiary hearing before being subjected to findings of misfeasance. *E.g., In re Ruffalo*, 390 U. S. 544 (1968); *Burkett v. Chandler*, 505 F. 2d 217 (C. A. 10, 1974), certiorari denied, 423 U. S. 876 (1975); *In re Ming*, 469 F. 2d 1352, 1355 (C. A. 7, 1972); *Bradley v. Fisher*, 80 U. S. 335, 355 (1871); *Randall v. Brigham*, 74 U. S. (7 Wall) 523 (1868). The Commission and the government attorneys in this case never knew that their integrity and competence were going to be questioned by the Court of Appeals, and therefore never had the chance to explain their conduct to this Court.

In our view, we addressed this question vigorously, and on many theories. First, we questioned whether 15 U. S. C. 2055(b)(1) was applicable when information was sought pursuant to an FOIA request. The Delaware court concluded that § 2055(b)(1) was applicable. We next argued that the information in the reports *was* accurate within the meaning of § 2055(b)(1), despite the fact that much of it was unverified. We thus argued that the companies, not the government, were responsible for any inaccuracies; that § 2055(b)(1) did not apply so long as we did not *represent* that the information was accurate: that the disclosed reports *would* accurately reflect the number and type of accidents which have occurred; that the disclosed information must be deemed accurate so long as it accurately reflected the information we had received from the companies; that we had in fact increased the accuracy of the reports we had received by using a computer to weed out all duplicate reports; and that disclosure should in any event be permitted since it would further the goals of the Act by informing the public of the type of hazards which can exist in operating TV receivers. Finally, we argued that § 2055(b)(1) should not be considered an absolute bar to disclosure, and that at the very lease, the Court should not bar disclosure, but

should direct the Commission to take additional measures to insure that the material complies with § 2055(b)(1). (See Memorandum in Support of Defendants' Motion for Summary Judgment and Opposition to Plaintiffs' Motions for Preliminary Injunctions, filed in the Delaware proceedings.)[10] The Court rejected all of the above arguments, ruling that the companies had demonstrated a substantial likelihood that § 2055(b)(1) barred disclosure of the reports. Since the Court found that the companies met the other necessary requirements for preliminary relief, it granted the requested injunction.[11] While it is true that we did not succeed in persuading the Court that our position was correct, the above summary of arguments makes it quite clear that the pro-disclosure position did not go unrepresented in Delaware, and that the government was and is quite genuine in its desire that Consumers Union, and the public in general, should have access to these reports.[12]

In addition to strongly defending on the merits of the reverse FOIA action, we believe that the litigation strategy we adopted in Delaware was completely consistent with our position that the requested documents should be disclosed. This Court has suggested that the government's failure to appeal the preliminary injunction,

10. A copy of this Memorandum is being lodged with the Clerk pursuant to the Motion referred to *supra*, p. 4, n. 2.

11. The government, of course, did not concede that the other necessary requirements for preliminary injunctive relief were met. To the contrary, we argued that the companies had failed to demonstrate that they would be irreparably harmed if the preliminary injunction did not issue, and that the granting of the injunction would not be in the public interest.

12. As we noted on p. 8, n. 3 of our appellees' brief, the government's decision not to contest the issuance of TRO's was a good faith decision that the government's position favoring disclosure could best be represented by submission of a brief fully setting forth the positions described above.

or to request the district court to take further action in the case, indicates a lack of good faith on behalf of government counsel. This suggestion is unfair, and should be corrected. The question whether to seek interlocutory review of the preliminary injunction was carefully considered by government counsel, and was only rejected by the Solicitor General of the United States after it was concluded that such an appeal would clearly be futile.[13] A preliminary injunction can only be reversed for a clear abuse of discretion. See *A. O. Smith v. F. T. C.*, 530 F. 2d 515 (C. A. 3, 1976). On the facts of this case, the Solicitor General did not believe we could convince the Third Circuit that Judge Latchum's decision to preliminarily enjoin disclosure was beyond the boundaries of his authority. For example, given the fact that the accident reports admittedly contained inaccuracies, we did not believe it was possible to show that the public would suffer irreparable harm if the documents were not immediately disclosed. This conclusion was bolstered by the fact that the terms of the preliminary injunction did not prevent the Commission itself from using the information to develop safety standards. Furthermore, there was nothing improper about the government filing an interlocutory appeal from the preliminary injunction, and then moving to have that appeal dismissed. It is a common and necessary practice for the government to file protective notices of appeal while the Solicitor General's office is deciding whether to actually prosecute an appeal. If the decision is made not to appeal, the government routinely files a motion to have the appeal dismissed. There is nothing sinister about this practice, and that is all that happened in this case.

13. See 28 C. F. R. 0.20(b) which vests the Solicitor General with authority to decide whether to prosecute government appeals to appellate courts.

Finally, we believe that it was perfectly reasonable for the government not to have encouraged the Delaware court to take further action in this case until a decision could be reached in the related case of *Pierce and Stevens Chemical Corp. v. CPSC*, W. D. N. Y., Civil No. 1975-410. Contrary to what this Court has stated in its opinion, slip op., p. 14, the Delaware court in effect did rule on the merits of the manufacturers' claim when it granted preliminary relief. The court did so by ruling against the government on the legal issue which we believe is central to this case, namely, the applicability of 15 U. S. C. 2055(b)(1) to an FOIA request. In light of that fact, we have no doubt that, had the matter at that time been brought to a final hearing, the court in all likelihood would have made its preliminary injunction permanent.[14] On the other hand, if the *Pierce and Stevens* court, which was faced with the same question, ruled that § 2055(b)(1) was not applicable, we believed that our chances of prevailing in Delaware would be significantly improved. For this reason, it was our considered opinion that our chances of prevailing on the merits in Delaware would be enhanced if the court postponed its final hearing. We believe this decision was perfectly logical, and bespeaks of the good faith of government counsel in attempting to litigate from a position of strength, not weakness, in the Delaware court.[15]

14. As we explain above, *supra*, p. 4, n. 2, the outcome of this issue has now been altered by the recent amendment to 5 U. S. C. 552(b)(3), which supports our position that § 2055(b)(1) is not applicable to FOIA requests.

15. The delay in Delaware was clearly not the result of any collusion between government counsel and counsel for the television manufacturers, as this Court appears to suggest. Indeed, in our view, the best strategy for the manufacturers to have followed would have been to seek an immediate hearing on the motion for a permanent injunction, which at that time probably would have

We need only add that if plaintiffs' able and experienced counsel had the slightest difficulty in accepting the government's litigation strategy in Delaware, they had a complete remedy by means of intervention in the Delaware case. Instead, plaintiffs' counsel deliberately chose —according to their own admission at oral argument—to stay out of the Delaware court for purely tactical reasons. It is thus particularly unfair for this Court to couple its attack on the government's handling of the Delaware case with reliance upon "the absence from the Delaware proceedings of any party requesting disclosure" (opinion, p. 17).

Conclusion.

The petition for rehearing should be granted and the Court should withdraw its opinion of July 5, 1977. In addition, we submit that the Court should affirm the order of the district court dismissing the complaint.

Respectfully submitted,

[Signatures of Counsel Deleted]

15. (Cont'd.)
been granted. We can only speculate as to why the manufacturers did not choose this course of action.

This Court also criticized the Commission for taking nine months to issue its decision to disclose (slip op., p. 12, n. 27). However, in view of the complexity of the case, *plaintiffs agreed to allow* the Commission this amount of time when the matter was before the Commission (App., p. 6).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—

No. 75-2059

—

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

APPELLANTS' RESPONSE TO PETITIONS FOR REHEARING.

On July 5, 1977, this Court issued an opinion reversing the District Court's order dismissing the complaint and remanding the case for a determination on the merits of plaintiffs' Freedom of Information Act ("FOIA") claim. Thereafter, appellees filed petitions for rehearing, including in some cases suggestions for rehearing *en banc*. On July 25, this Court entered an order directing that appellants respond to those petitions on or before August 22nd. For the reasons set forth below, the petitions should be denied, except insofar as they seek a modification of the Court's direction to the District Court to proceed directly to the merits of plaintiffs' claims. As to that portion of the judgment, a minor modification is appropriate to account for the fact, which appellees should previously have made known to the Court, that the Delaware action was not closed out completely as it reasonably appeared to the Court and appellants to be.

The decision appealed from dismissed this FOIA action because it found there to be no "case or controversy" under Article III of the Constitution. This Court reversed that determination for reasons set forth at pages 10-13 of its opinion. Specifically, it found that the disagreement over the effect of the Delaware proceeding was sufficient to satisfy Article III, and then went on to discuss "a second, independent reason for rejecting appellees' contention that a case or controversy is lacking." Slip Op. at 12. It is this second independent reason which appellees attack as being based on the erroneous assumption that the Delaware case was closed out; nothing in their petitions raises any new matters concerning the first reason which is alone sufficient to require reversal.

In this connection it is appropriate to say a word about the confusion as to the meaning of what the District Court in Delaware did in its Order of August 20, 1976, closing out that case, at least for some purposes. Since only appellees were parties to that proceeding, it was plainly incumbent upon them to advise the Court fully as to its status. In particular, when questions were raised about the August 20th Order at oral argument, a request should have been made then, and not after the July 5th ruling, to supplement the record with copies of the appropriate papers from the Delaware case. Had that been done, none of these supplementary proceedings would have been necessary.

Nonetheless, regardless of questions of responsibility, it does appear to appellants from the papers submitted on rehearing, that the Delaware action is now alive. If that is correct, it does not change the basic ruling of this Court that the District Court was in error in finding no case or controversy. It merely goes to the question of what relief is appropriate on remand since the closing of the Dela-

ware action was only one of two reasons the Court gave to support its finding that a live controversy existed. Therefore, that portion of the opinion which denied the District Court the discretion to proceed in any manner except on the merits should be deleted, and the case remanded for further proceedings consistent with the opinion, in particular the Court's conclusion that "the pro-disclosure position was all but unrepresented" in the Delaware proceeding. Slip Op. at 17.

Although there is a theoretical possibility that a conflict between the actions of the two District Courts may arise, the likelihood of that occurring has been diminished because the Government has moved to transfer the Delaware action to the District of Columbia which is the only jurisdiction in which all parties can be joined. (Gov't. Pet. at 4).[1] If that motion is granted, the two cases can be consolidated, and the parties can proceed to the merits. If transfer is not granted, there are other ways in which the matter can be resolved, none of which bear on the only issue before this Court, which is whether there is an Article III case or controversy in this case.

Another point should be made regarding the Government's defense of the Delaware action which demonstrates the need to join all parties in that case under Rule 19. Regardless of whether the Delaware action was technically closed, it was clearly closed for all practical purposes since the defendants failed to carry their appeal forward *and* failed to proceed to obtain a final judgment in the Delaware District Court from which another appeal could be taken. It is simply no answer to say that defendants

1. In light of the prior history of this case, it would seem appropriate that all papers related to that motion should be filed in this Court so that there is no question as to their effect and meaning.

waited for over a year for the outcome of a case in the Western District of New York (Gov't Pet. at 13-14), for if the trial judge in Delaware was unpersuaded by the arguments of defendants on the motion for a preliminary injunction, the decision of another district judge is unlikely to change his views. Moreover, it does not explain the failure of defendants to take discovery which they recently claimed is essential to their defense. (Tr. of July 11, 1977 Hearing in Delaware District Court, at 8). And, perhaps most important of all, they did absolutely nothing to reopen the case when Congress made a major amendment to the third exemption to the FOIA in September 1976, which they admit "has undermined the legal basis for the court's preliminary injunction order. . . ." (Gov't. Pet. at 4, n. 2). See also *GTE Sylvania Inc. v. Consumer Product Safety Comm.*, 404 F. Supp. 352, 370 (D. Del. 1975).

All of these matters are offered not to criticize government counsel or to engage in second-guessing of their litigation strategy. They are offered to show that Federal agencies cannot adequately represent requesting parties in reverse FOIA cases and that the only way such cases will be fully and fairly litigated is by having known requesters joined under Rule 19. Unless they are made parties, any judgment obtained is not binding on them, and they continue to have a live dispute with the agency withholding the documents. Slip Op. at 11. That fundamental conclusion was the premise underlying this Court's ruling of July 5th, and the fact that the Delaware action is still technically alive does not constitute a defense to the erroneous dismissal by the District Court for the District of Columbia.

For the foregoing reasons, rehearing should be denied except to the limited extent of modifying the direction to

the District Court to proceed directly to the merits of the controversy.[2]

Respectfully submitted,

[Signatures of Counsel Deleted]

2. Nothing in the petitions of the manufacturing defendants arguably meets the standards of Rule 35 F. R. A. P., or Rule 14 (a)(3) of this Court for *en banc* consideration.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—

No. 75-2059

—

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

—

Before: BAZELON, *Chief Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

—

Order.

After considering the applications for rehearing filed by federal appellees, appellees Aeronutronic Ford Corporation, et al., appellees Admiral Corporation, et al., and appellee RCA Corporation, together with supporting memoranda, and appellants' response, it is

ORDERED by the Court that the applications for rehearing are denied for the reasons stated in the attached *per curiam*.

Per Curiam
For the Court
George A. Fisher, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

PER CURIAM: On June 14, 1974 appellants sought production of the documents in suit here under the Freedom of Information Act. Instead of producing the documents after determining that the Act required production, appellee Consumer Product Safety Commission (CPSC) notified intervenors of their intention to do so. Whereupon intervenors filed injunction proceedings against the CPSC in various district courts, including the District of Delaware, seeking to prevent production. Subsequently, the District Court in Delaware issued a preliminary injunction precluding production. Later that court ordered the case closed with the preliminary injunction still pending.

This appeal is from the dismissal of appellants' FOIA case by the District Court here on the ground that no case or controversy existed since the CPSC agrees with appellants that the documents should be produced but is prevented from doing so by the preliminary injunction in the "closed" Delaware case. We reversed, holding that a case or controversy did indeed exist because CPSC continues to refuse to produce the documents.

Since our ruling we are advised that the Delaware case was marked "closed" for statistical reasons in that the case had been inactive for some time. Also, within a few days after our ruling, the Delaware case suddenly became active with a hearing in court, at which a date for trial on the merits was set. Appellants here, however, who have been attempting since 1974 to obtain production of the documents under FOIA, and against whom the Delaware litigation is directed, are not parties to the Delaware litigation. *See* Rule 19, Fed. R. Civ. P. Since all necessary parties are before the District Court here, there appears no reason why the litigation should not proceed here, particularly since this is the venue authorized by the FOIA.

5 U. S. C. § 552(a)(4)(B) (Supp. IV, 1974).* Since the Act also provides that actions under it should be expedited, 5 U. S. C. § 552(a)(4)(D) (Supp. IV, 1974), at long last so be it.

So ordered.

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* It is noteworthy that the Department of Justice has moved to transfer the Delaware case to the District of Columbia.

IN THE
UNITED STATES COURT OF APPEALS
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No. 75-2059

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CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

—

Before: BAZELON, *Chief Judge,* WRIGHT, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges.*

Order.

On consideration of the suggestions for rehearing *en banc,* and no judge in regular active service having requested a vote thereon, it is

ORDERED by the Court, *en banc,* that the aforesaid suggestions are denied.

Per Curiam
For the Court:
George A. Fisher, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

—

Civil Action No. 75-705

—

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

September 11, 1975

Opinion.

RICHEY, *District Judge.*

Plaintiffs Consumers Union of United States, Inc., and Public Citizens' Health Research Group filed this action on May 5, 1975, seeking access under the Freedom of Information Act, 5 U. S. C. § 552, to certain reports on television accidents submitted to the Consumer Product Safety Commission (CPSC) by various television manufacturers. The defendants in this case are the CPSC, its Chairman, Commissioners, and Secretary; and twelve television manufacturers which submitted the reports in question. The plaintiffs seek relief in the following form: (a) a declaration that the requested documents, currently in possession of the CPSC, must be made immediately available to the plaintiffs for inspection and/or copying; and (b) an injunction enjoining the CPSC and its agents and employees from failing to make the requested documents immediately available to plaintiffs for inspection and/or copying.

The case is currently before the Court on the motions of ten television manufacturers to dismiss or, in the alternative, to stay these proceedings.[1] The defendants claim that with respect to the Government, the complaint fails to present a "case or controversy" within the meaning of Article III, section 2 of the United States Constitution,[2] and that with respect to the manufacturers the complaint fails to state a claim upon which relief can be granted. The defendant-manufacturers also claim that because a similar action involving virtually the same issues is pending in the United States District Court for the District of Delaware, this action should be dismissed in the interests of comity and judicial economy.

I. Background.

A somewhat complex course of events provides the background for this action. In May, 1974, the CPSC issued special orders to television manufacturers requesting that they submit, *inter alia*, all accident reports collected by the manufacturers since the National Commission on Product Safety held certain hearings in 1969. The CPSC also invited the manufacturers to indicate which, if any, of the reports they submitted were, in the manufacturers' view, entitled to exemption from disclosure under the Freedom of Information Act (FOIA). In June, 1974, plaintiffs herein requested access, under the FOIA, to the documents submitted by the manufacturers in response to the CPSC's orders of the previous month. While the

1. Defendants Admiral, Aeronutronic Ford, General Electric, GTE Sylvania, Magnavox, RCA, Sharp, Toshiba, Warwick, and Zenith have so moved. The remaining defendants, Motorola, Matsushita, and the CPSC, have in effect so moved by praying for dismissal in their answers to the plaintiffs' complaint.

2. The federal defendant has also, in effect, so moved. See note 1, *supra*, and Answer of the Consumer Product Safety Commission at "First Defense".

plaintiffs were given access to those reports for which confidentiality was not claimed by the manufacturers, the plaintiffs were not immediately afforded access to the documents which the manufacturers claimed were exempt from the FOIA. Instead, the CPSC, in August, 1974, informed the manufacturers of the plaintiffs' FOIA request and directed the manufacturers to substantiate their claims of confidentiality. In the meantime, the CPSC had determined, in July, 1974, that the manufacturers' response to its first request for documents was not complete; the CPSC ordered the manufacturers to make further submissions and extended the plaintiffs' FOIA request to the additional data submitted by the manufacturers. Plaintiffs subsequently limited their request to exclude documents protected by the attorney-client privilege or the work-product doctrine and those portions of documents which contained the names and addresses of accident victims.

With their request still unanswered, plaintiffs informed the CPSC in October, 1974, that any further delay would be considered by the plaintiffs as a denial of their request under the FOIA. As a result of that communication, representatives of the plaintiffs and the CPSC met in November, 1974, and agreed upon a timetable for the completion of CPSC's review of the voluminous submissions. It was estimated that the CPSC's legal determination as to the availability of the requested documents would be completed by mid-March of 1975. Plaintiffs acquiesced in that timetable, but expressly reserved the right to consider additional delay as a denial of their request.

On March 28, 1975, the CPSC issued its legal determination that the documents requested by the plaintiffs did not fall within the exemptions of the FOIA and that, even if the data were exempt, disclosure by the CPSC was

nonetheless within its discretion and, in this case, appropriate in the interest of public health and safety. The CPSC subsequently notified the television manufacturers of its decision to release the requested documents and of its intention to withhold disclosure until May 1, 1975. Upon said notice, seven of the defendant television manufacturers filed separate actions against the CPSC in the United States District Court for the District of Delaware,[3] each seeking an injunction prohibiting disclosure on the grounds that the release of the documents is barred by the exemptions to the FOIA and certain portions of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq*. Five other television manufacturers filed similar separate actions in the United States District Court for the Southern District of New York,[4] the United States District Court for the Northern District of New York,[5] and the United States District Court for the Western District of Pennsylvania.[6] In all of the actions, the manufacturers applied for temporary restraining orders prohibiting the release of the documents pending determination of their motions for preliminary injunction. The CPSC consented to the temporary restraining order in at least some of the cases.[7]

3. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (C. A. No. 75-104), RCA (C. A. No. 75-108), Magnavox (C. A. No. 75-112), Zenith, (C. A. No. 75-113), Motorola (C. A. No. 75-114), Warwick (C. A. No. 75-115), and Aeronutronic Ford (C. A. No. 75-116).

4. Matsushita (C. A. No. 75-2040), Sharp (C. A. No. 75-2049), and Toshiba (C. A. No. 75-2050), filed actions in the Southern District of New York.

5. General Electric (75-CV-189) filed suit in the Northern District of New York.

6. Admiral (C. A. No. 75-531) filed suit in the Western District of Pennsylvania.

7. The plaintiffs claim that the agency consented to the orders in all of the cases filed by the manufacturers. Plaintiffs' complaint at ¶ 11. The CPSC claims that it consented to some but not all of

The instant action was filed on May 5, 1975. Subsequently, the individual actions filed by the television manufacturers were consolidated in the District of Delaware.[8] Oral arguments on the preliminary injunction motion in the consolidated cases were heard by Chief Judge Latchum in July, 1975. The documents in question in both this action and the consolidated cases in Delaware remain in the possession of the CPSC and subject to the above-mentioned restraining orders pending Judge Latchum's decision on the motion for preliminary injunction.[9]

II. No Case or Controversy Exists Between Plaintiffs and the CPSC.

Plaintiffs invoke the jurisdictional sections of the FOIA, 5 U. S. C. § 552(a)(3), and the Administrative Procedure Act, 5 U. S. C. § 702, as bases for this Court's jurisdiction in this case.[10] Both statutes pertain to actions against federal agencies. In this case, plaintiffs seek an order instructing the agency to provide plaintiffs access to the documents in question for inspection and/or copying. At the heart of plaintiffs' claim is their contention that the documents are subject to mandatory disclosure under

7. (Cont'd.)
the orders. Answer of the Consumer Product Safety Commission at ¶ 11. For purposes of this motion to dismiss, plaintiffs' allegations are taken as true.

8. *In re: Consumer Product Safety Commission Litigation*, Civil Action Nos. 75-104, 75-108, 75-112, 75-113, 75-114, 75-115, 75-116, 75-122, 75-131, 75-136, 75-150, 75-151, 75-152 (D. Del.).

9. The statement of facts above is drawn from all of the substantive pleadings in this case.

10. Plaintiffs also invoke the Declaratory Judgment Act, 28 U. S. C. § 2201-02, as a ground for this Court's jurisdiction, plaintiffs' complaint at ¶ 2. The Declaratory Judgment Act is not, however, a statute which confers jurisdiction. See, *e.g.*, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667 (1950).

the FOIA.[11] The defendant agency, however, came to the exact same conclusion in its above-mentioned formal finding of March 28, 1975. The CPSC and the plaintiffs thus stand in the same position on the crucial issue in this case.

The Constitution extends federal courts' jurisdiction only to specified cases and controversies.[12] Implicit in the "case and controversy" doctrine is the requirement that litigation must arise "between adverse litigants." *Muskrat v. United States,* 219 U. S. 346, 361 (1911); *Aetna Life Insurance Co. v. Hawarth,* 300 U. S. 227 (1937). Where opposing litigants desire "the same result," as here, there is "no case or controversy within the meaning of Art. III of the Constitution." *Moore v. Charlotte-Mecklenburg Board of Education,* 402 U. S. 47, 48 (1971); *General Electric Co. v. Bootz Mfg. Co.,* 289 F. Supp. 504 (D. Ind. 1968). This Court is faced with the prospect in the instant action that both the plaintiffs and the CPSC will submit briefs urging the same conclusion as to the availability of the documents under the FOIA. In such a posture, this case does not present a question "in an adversary context," as required by the Constitution. *Flast v. Cohen,* 392 U. S. 83, 95 (1968).

Plaintiffs contend, however, that the "controversy" which they present as between themselves and the agency centers on the agency's failure to contest the temporary restraining orders issued in the now-consolidated cases brought by the manufacturers. According to the plaintiffs, the agency's failure to contest the orders constituted a violation of the agency's duty under the FOIA to speedily deliver the documents in question once a determination

11. See plaintiffs' complaint at ¶ 13.

12. U. S. Const., art. III, § 2. See *Golden v. Zwickler,* 394 U. S. 103 (1969); *Baker v. Carr,* 369 U. S. 186 (1969).

was made that such documents were subject to disclosure. Plaintiffs also allege that the agency's failure to contest the orders reflects a certain lack of good faith toward the plaintiffs.

As an initial matter, this Court notes, admittedly without having all of the facts before it,[13] that it does seem curious that the agency, having just completed a nine-month legal investigation which led to the conclusion that the documents were available under the FOIA, failed to make even a *pro forma* opposition to the motions for restraining orders. However, regardless of any possible impropriety on the agency's part, its failure to contest the motions does not present a "controversy" between plaintiffs and the CPSC in this case. Plaintiffs do not ask for a mere declaration that the agency "shouldn't have" consented to the orders—it is doubtful, in fact, that such a "wrong" would be actionable. Plaintiffs ask instead that the agency be ordered to release the documents to the plaintiff, and a decision to that effect made by this Court would necessarily entail a determination that the documents are subject to disclosure under the FOIA. As discussed above, there is no adversity between the agency and the plaintiffs, and thus no case or controversy, with respect to the FOIA issue.

Plaintiffs point to the case of *Robertson v. Department of Defense,* Civil No. 74-644 (D. D. C., June 19, 1975), in support of their claim that a controversy exists in the instant action. *Robertson* involved a very similar fact situation to this case. The General Motors Corporation had submitted certain documents to the Department of Defense which Robertson subsequently requested, for purposes of inspection, under the FOIA. The Department determined that some *but not all* of the documents were

13. See note 7, *supra.*

subject to FOIA disclosure. General Motors thereupon sued the Department and other federal defendants in the United States District Court for the Eastern District of Virginia, seeking an injunction against the disclosure of the documents. Robertson countered by filing an FOIA suit against the Department and General Motors in this Court. In allowing the plaintiff to maintain suit, Judge Barrington D. Parker pointed out what is, for purposes of the instant case, the crucial characteristic of *Robertson*: "[I]n the Virginia proceeding and in the matter before this Court, the government has never taken the position espoused by Robertson—that the documents, in their entirety, are obtainable under the Act." Memorandum Opinion of June 19, 1975, at 8. In *Robertson*, unlike the instant action, there were areas of disagreement between the plaintiff and the governmental defendant.[14]

In essence, what the plaintiffs ask this Court to do in the instant case is to re-determine whether the restraining orders obtained by the manufacturers in various federal district courts should have issued. It is true that the CPSC consented to the various orders. Nonetheless, it was the responsibility of each court—and this Court cannot but assume that said responsibility was met—to make an independent determination that an order was justified. See, *e.g.*, Judge Latchum's Temporary Restraining Order of April 23, 1975, in *RCA Corp. v. United States Consumer Product Safety Commission*, Civil No. 75-108 (D. Del. filed April 22, 1975). As the United States Court of Appeals for the District of Columbia Circuit has noted, "in the interests of comity and the orderly administration of justice we should not attempt to reexamine . . . matters considered and resolved by . . . a court having authority equal to our own." *Hilton Hotels Corp. v. Weaver*, 325 F. 2d 1010 (1963), *cert. denied*, 376 U. S. 951 (1964) (footnote omitted).

14. Plaintiffs also question the genuineness of the agency's conclusion on the FOIA issue: "[E]ven if the Commission should prevail in the Delaware action, it could then decide as a discretionary matter to refuse to disclose the data to plaintiffs." Plaintiffs' Motion for Summary Judgment at 43 n. * *. But the agency has assured the Court on the public record that "disclosure will be made as soon as the federal defendants are not enjoined from doing so." CPSC's Answer at ¶ 13.

III. Plaintiffs' Complaint Fails to State a Claim Against the Defendant-Manufacturers Upon Which Relief Can Be Granted.

As noted above, this case is brought under the FOIA and the Administrative Procedure Act. Those statutes entitle a claimant to relief against federal agencies and, accordingly, plaintiffs' complaint is styled to request relief from inaction by the CPSC. Plaintiffs have also named twelve television manufacturers as defendants in this case, but no relief is requested from the manufacturers. Indeed, the manufacturers are in no position to provide relief inasmuch as the documents in question are in the possession of the agency. Thus, as to the defendant-manufacturers, plaintiffs "can prove no set of facts in support of [their] claim which would entitle them to relief." *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957). The defendant-manufacturers would thus seem to be entitled to dismissal under Fed. R. Civ. P. 12(b)(6) because of plaintiffs' failure to state a claim upon which relief can be granted.

Plaintiffs maintain, however, that because the defendant-manufacturers have such a strong interest in the outcome of this litigation, they are subject to suit under the compulsory joinder provision of Fed. R. Civ. P. 19(a). Assuming *arguendo* that Rule 19(a) could be so employed in the current litigation, the plaintiffs would nonetheless be faced with an uncleared hurdle: lack of jurisdiction.

As noted in the preceding section, there is no case or controversy between plaintiffs and the federal defendant. Lack of a case or controversy is a jurisdictional defect. See *Aetna Life, supra; Tilley Lamp Co. v. Thacker*, 454 F. 2d 805, 808 (5th Cir. 1972). Plaintiffs have suggested that "even assuming *arguendo* that no live case or controversy existed between plaintiffs and the Commission, nothing is clearer than that a very live case or controversy exists between plaintiffs and the manufacturers." Plaintiffs' Motion for Summary Judgment at 35. Plaintiffs would thus provide the missing jurisdictional ingredient of case or controversy by joining, under Rule 19(a), the defendant-manufacturers who certainly possess an interest adverse to plaintiffs' in this litigation. The plaintiffs' solution is ingenious but unfortunately not authorized by Rule 19, which is "predicated upon the preexistence of federal jurisdiction over the cause of action . . ." *Letmate v. Baltimore and Ohio R. R.*, 311 F. Supp. 1059, 1062 (D. Md. 1970). Rule 19 canot be used "in a way that would extend the subject matter jurisdiction of the Federal courts; indeed, Rule 82 precludes any construction of the Rule that would have such an effect." 7 Wright and Miller, *Federal Practice and Procedure* § 1602, at 20 (footnote omitted); see also *Anderson v. United States*, 217 F. Supp. 814 (E. D. Pa. 1963).

IV. Conclusion.

Plaintiffs' complaint must therefore be dismissed for failure to present a case or controversy as to the federal defendant and failure to state a claim upon which relief can be granted as to the defendant-manufacturers.[15] In

15. Defendant-manufacturer Warwick has moved for dismissal on the additional grounds that this Court lacks personal jurisdiction over Warwick. In view of the Court's disposition of this case, it is unnecessary to consider Warwick's motion.

reaching this conclusion, the Court notes that it is especially reluctant to bar the courthouse door when the plaintiff is, as in the instant case, a representative of the public interest. But the Constitution demands no less, considering the present posture of this case.

The Court is aware of the possibility that plaintiffs failed to intervene in the Delaware proceedings in the hope that this Court would assume jurisdiction in the present case. In declining to do so, this Court in no way intends to prejudice any future efforts plaintiffs might make to intervene in the Delaware proceeding.

An order in accordance with the foregoing Memorandum Opinion will be issued of even date herewith.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

Dated: September 11, 1975

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Order.

This case has come before the Court on the motions of various defendants to dismiss and the plaintiffs' opposition thereto. The Court has considered the extensive pleadings filed by the parties in this case, and for the reasons set forth in the memorandum opinion of the Court of even date herewith, concludes that the case should be dismissed because: (a) as to the federal defendant, plaintiffs do not present a case or controversy within the meaning of Article III, section 2 of the United States Constitution; and (2) as to the defendant-manufacturers, plaintiffs do not state a claim upon which relief can be granted.

Therefore, it is, by the Court, this 11th day of September, 1975,

ORDERED, that defendants' motion to dismiss be, and the same hereby is, granted; and it is

FURTHER ORDERED, that this case be, and the same hereby is, dismissed.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-104

GTE SYLVANIA INCORPORATED

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.*

October 23, 1975

Opinion.

LATCHUM, *Chief Judge.*

In these thirteen separate actions, each plaintiff, a manufacturer of television receivers, seeks a preliminary injunction restraining the Consumer Product Safety Commission ("Commission"), its members and officers from disseminating certain information to the public which the plaintiffs contend is privileged, confidential, misleading and inaccurate.

Congress, in 1972, enacted the Consumer Product Safety Act (the "Act"), 15 U. S. C. § 2051 et seq., in order to "establish comprehensive and effective regulation over the safety of unreasonably hazardous consumer products." [1]

* Consolidated with, RCA Corp., 75-108; Magnavox Co., 75-112; Zenith Radio Corp., 75-113; Motorola, Inc., 75-114; Warwick Electronics, Inc., 75-115; Aeronutronic Ford Corp., 75-116; Teledyne Mid-America Corp., 75-122; Admiral Corp., 75-131; General Electric Co., 75-136; Matsushita Electric Corp. of America, 75-150; Sharp Electronics Corp., 75-151; and *Toshiba America, Inc. v. Consumer Product Safety Commission*, 75-152.

1. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 26 (1972). The purposes of the Act are:

"(1) to protect the public against unreasonable risks of injury associated with consumer products;

To implement and administer this legislative policy, the Act established the Commission as an independent regulatory agency. Shortly after its creation, the Commission became concerned about the safety of television sets. During the spring and summer of 1974, the Commission sought and obtained television-related accident data from television manufacturers in three ways: by a general public request for information, by a special order pursuant to 15 U. S. C. § 2076(b)(1), and finally by the issuance of subpoenas duces tecum pursuant to 15 U. S. C. § 2076 (b)(3). Upon receipt of such information, the data was consolidated and a computer printout was prepared which listed the alleged accident separately. On March 28, 1975, the Commission decided to release to the public the bulk of the television-related accident material in its possession which it had gathered from the plaintiffs.

Subsequently, each of the thirteen plaintiffs brought a suit against the Commission [2] for an injunction prohibiting the public dissemination of the information obtained from each on the ground that such information was privileged, confidential, misleading and inaccurate. The thirteen

1. (Cont'd.)

(2) to assist consumers in evaluating the comparative safety of consumer products;

(3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and

(4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries." 15 U. S. C. § 2051(b).

2. In addition to the Commission, the following members, officers and employees were named as defendants: Richard O. Simpson, Chairman, Constance B. Newman, Vice Chairman, R. David Pittle, Lawrence M. Kushner, Barbara Hackman Franklin, Commissioners, Sadye E. Dunn, Secretary, and Vince DeLuise, Freedom of Information Officer. They will be referred to collectively as the "Commission" or "defendants."

actions were consolidated [3] for a hearing on plaintiffs' motions for preliminary injunctive relief. The defendants also consented to the entry of a temporary restraining order [4] prohibiting the public disclosure pending the Court's decision on plaintiffs' present motions.[5]

I. Background

In March 1974, the Commission issued a public notice [6] announcing that it would hold a public hearing to investigate the hazards encountered during the operation of television receivers and to consider the necessity of developing safety standards for such receivers. By this notice, the Commission sought certain technical information and TV-related accident data from manufacturers of television sets and the component parts thereof. The notice described the accident data sought in part as follows:

> "Although the hearing is intended to emphasize fires and shocks related to TV sets, information pertaining to all aspects of TV set safety may be submitted (with the exception of radiation hazards . . .).
>
> • • •

3. Docket Item 10 (C. A. No. 75-104).

4. Docket Item 3 (C. A. No. 75-104). The temporary restraining order was later modified to permit release of the gathered information to four employees of Underwriters Laboratories, Inc., which had been retained by the Commission to develop safety standards for television receivers. In addition the data without identification of manufacturer, model or chassis number was authorized to be released to Underwriters Laboratories, Inc. and other individuals involved in developing the safety standards. Docket Item 34 (C. A. No. 75-104).

5. Defendants also moved for summary judgment in each case (Docket Item 35, C. A. No. 75-104), but these motions are not presently before the Court. (Docket Item 42, p. 3, C. A. No. 75-104).

6. 39 Fed. Reg. 10929 (March 22, 1974).

> . . . In particular, each TV manufacturer is requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data recording procedures differ from the method proposed in the 1969 'Electronic Industry Ad Hoc Engineering Report on Television Fires' which was submitted to the National Commission on Product Safety, place (sic) indicate the procedures used." [7]

Although a few manufacturers complied with the Commission's general request for data, their principal response consisted of a six page summary of accident data supplied by the Electronics Industry Association ("EIA").[8]

After reviewing the data voluntarily submitted, the Commission concluded that "the information submitted to the Commission by the EIA on behalf of the [Companies did] not satisfy the Commission's request." [9] Thus on May 13, 1974, the Commission, acting pursuant to 15 U. S. C. § 2076(b)(1),[10] sent special orders to twenty-five manufacturers of television receivers and components.[11] The information sought by these special orders

7. *Id.* 10930.

8. Par. 5 Affidavit of Constance B. Newman, Vice Chairman of the Commission ("Newman Aff'd") Docket Item 27, C. A. No. 75-112.

9. *E.g.*, Special Order of Commission to General Electric Company. Docket Item 11A, Ex. A-1, C. A. No. 75-136.

10. 15 U. S. C. § 2076(b)(1) provides: "The Commission shall have the power—(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission shall be made within such reasonable period and under oath or otherwise as the Commission may determine."

11. Of the plaintiffs here, only RCA did not receive a special order. Newman Aff'd, par. 6.

was broken down into six categories: (1) TV-related accident data, (2) Current, future-planned and suggested TV-related safety standards, (3) Quality control and quality assurance plans, (4) Service technicians, (5) Improvement plans for presently used sets, and (6) Specific technical areas.[12]

The instructions for the TV-related accident data category provided:

> "You are requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data recording procedures differ from the method proposed in 1969 'Electronics Industry Ad Hoc Engineering Report on Television Fires' which was submitted to the National Commission on Product Safety, please indicate the procedures used." [13]

In the cover letter [14] accompanying the special orders, the Commission "[recognized] that some of the information to be submitted [might] be proprietary" and referred the manufacturer to certain statutory provisions [15] designed to protect confidential information supplied to the government. The Commission encouraged compliance by stating in the cover letter:

> "This information will be received in confidence. It will not be placed in a public file and will not initially be made available to the public."

12. *E.g.*, Special Order of Commission to General Electric Company. Docket Item 11A, Ex. A-1, C. A. No. 75-136.

13. *Id.*

14. *E.g.*, Letter of Richard O. Simpson, Chairman of the Commission, to General Electric Company, May 13, 1974. (Docket Item 11A, Ex. A-1, C. A. No. 75-136).

15. 15 U. S. C. § 2055(a)(1), 5 U. S. C. § 552(b)(4) & (7), 15 U. S. C. § 2055(a)(2), and 18 U. S. C. § 1905.

However, the possibility of a request for public access to this information by way of the Freedom of Information Act ("FOIA"), 5 U. S. C. § 552, was noted, and the manufacturers were instructed to identify data claimed to be exempt from public disclosure and to "substantiate" any such claims. Claims of confidentiality accompanied the response of most manufacturers.[16]

Again, the Commission was not satisfied with the data supplied by the manufacturers pursuant to the special orders and the companies were notified as follows:

> "The Commission has reviewed your response to its May 13, 1974, Special Order requesting information on TV-related fire and shock hazards. Although we recognize your effort to comply with the terms of the Special Order, technical analysis shows that your response fails to provide sufficient information with respect to certain questions enumerated in the Order.
>
> Accordingly, the Commission has decided to issue the attached subpoena, pursuant to section 27(b)(3) of the Consumer Product Safety Act [15 U. S. C. § 2076(b)(3)] which specifies the additional information required.
>
> It should be noted that failure to respond to the subpoena within the time specified therein may, pursuant to section 27(c) of the Act [15 U. S. C. § 2076(c)] lead to entry of a court order against you directing compliance with the Commission's subpoena." [17]

16. *E.g.*, Letter of H. C. Burgess, General Electric Co., to Richard O. Simpson, Chairman of the Commission, May 29, 1974. Docket Item 11A, Ex. A-2, C. A. No. 75-136.

17. *E.g.*, Letter of Sadye E. Dunn, Secretary of the Commission, to H. B. Walden, General Electric Co., July 26, 1974 (Docket Item 11A, Ex. A-3, C. A. No. 75-136).

Thus, on July 26, 1974 subpoenas duces tecum were issued to the plaintiffs and three other TV manufacturers [18] requiring the production of certain technical information and all television-related accident data [19] as follows:

> "All TV-related accident reports collected since the 1969 hearings held by the National Commission on Product Safety. The term 'reports', includes, but is not limited to, all physical forms of: correspondence, letters; telegrams; cables; tapes; recordings; photographs; films; memoranda, including writeups of telephone calls and other oral communications; press releases, bulletins; newspaper, magazine or other journalistic articles; diaries; charts; contracts; agreements; and any other writing prepared by any person or persons, including those by insurance firms, investigators, laboratories and researchers; and includes both origi-

18. Sony Corp., Sanyo Electric, Inc., and Wells-Gardner Electronics Corp. were subpoenaed but did not seek to bar public disclosure of data which they forwarded to the Commission. Newman Aff'd, par. 8. Apparently, the Commission did not order all manufacturers of TV sets sold in this country to submit accident reports. Deposition of Robert L. Northedge ("Northedge Dep.") p. 78. Northedge, an electrical engineer, employed by the Bureau of Engineering Science of the Commission was project manager of the Commission's investigation of television hazards.

19. *E.g.*, subpoena duces tecum addressed to H. B. Walden, General Electric Co., July 26, 1974 (Docket Item 11A, Ex. A-3, C. A. No. 75-136). Prior to serving the subpoenas the Commission had been warned of the confusion that might result from the problem of defining a TV-related accident. Letter of A. E. Allen, Philco-Ford Corp. to the Commission, May 28, 1974 appended to Joint Memorandum of GTE Sylvania and Aeronutronic Ford Corp. in support of motion for preliminary injunction (Docket Item 24, C. A. No. 75-104). Evidently, there is no standard definition of TV-related accidents. Northedge Dep. pp. 29-32. Moreover, the brief preface of the subpoenas referred to the Commission's "investigation of shock and fire hazards associated with television receivers," but the body of the subpoenas designated "[a]ll TV-related accident reports."

nals and copies whether or not sent or received. The term 'reports' includes those reports maintained on a form (sample attached) designed by members of the Electronics Industries Association (EIA) and submitted to the National Commission on Product Safety in November 1969 and also those reports maintained on any and all forms substituted for the attached sample EIA form." [20]

Standards of reliability and accuracy for the data sought were indicated on sample data forms accompany-the subpoenas.

"The purported information in this form is based upon such reports as are available but in many cases will be incomplete, unverified and even incorrect." [21]

The Commission sought unverified information intentionally because it wanted to obtain as large a data base as possible.[22] Again, accident reports supplied in compliance with the subpoena duces tecum were accompanied by claims of confidentiality.[23] However, the Commission did not mention the issue of confidentiality in either the subpoena or the cover letter.

In order to reduce the information contained on the approximately 120,000 pieces of paper received in response to the subpoenas duces tecum to a manageable form, the

20. The description of TV-related accident data was identical for each subpoena. On the other hand, the technical information requested did vary slightly from manufacturer to manufacturer, but, generally, it corresponded to the materials sought in the May 13, 1974 special order. (Newman Aff'd, par. 9.)

21. Docket Item 35, C. A. No. 75-104.

22. Northedge Dep. pp. 169, 200, 258.

23. Newman Aff'd, par. 10; *E.g.*, Letter of F. R. Wellner, General Electric Co., to Sayde E. Dunn, Secretary of the Commission, October 22, 1974 (Docket Item 11A, Ex. A-4, C. A. No. 74-136).

Commission retained Tracor-Jitco, Inc. ("Tracor") to extract and categorize the data contained in the accident reports.[24] This consolidation of information was designed to assist the organization engaged in developing safety standards and also to make the accident data more meaningful to members of the public who might inspect it under the Freedom of Information Act.[25] Data summary sheets were prepared by gleaning from accident reports the appropriate responses for the several categories.[26] Although many reports did not contain enough data to answer each question,[27] the Commission was seeking as much information in manageable form as possible.

Tracor was responsble for transferring information from the accident reports to the data summary sheets from which the computer cards could be keypunched. In order to ensure that Tracor's employees performed the tasks accurately, Tracor's supervisor initially reviewed every sheet and later performed random checks by comparing the extracted data against the original report. Also, Robert A.

24. Newman Aff'd, pars. 10, 15.

25. Northedge Dep. pp. 24-25; Memorandum of Robert L. Northedge to Enid Rubenstein of the Commission, December 3, 1974 (Docket Item 11A, Ex. B, C. A. No. 75-136).

26. A memorandum from Edward J. Cull, Office of General Counsel, to the Commissioners ("Cull-Memorandum") 2, March 21, 1975 (Docket Item 11A, Ex. A-7, C. A. No. 75-136) lists twenty-five categories of extracted information: (1) file number assigned to the accident, (2) manufacturer, (3) model numbers, (4) chassis number, (5) TV type (color or black and white), (6) chassis type, (7) switch type, (8) model type, (9) cabinet material, (10) year of manufacture, (11) owner's initials, (12) failed part, (13) location of failed part in set, (14) prior indication of trouble, (15) repaired prior to accident, (16) electric power status, (17) time in electric power status, (18) type of accident, (19) time of day, (20) state, (21) location, (22) number of injuries, (23) number of fatalities, (24) damage and (25) amount and type of claims. The Newman affidavit indicates that there were twenty-seven categories of information. Newman Aff'd, par. 15(a).

27. Northedge Dep. pp. 190-94.

Yereance, a consultant retained by the Commission, screened the same sheets that the Tracor supervisor examined. Finally, Robert L. Northedge, the Commission project manager, reviewed some of the abstracts.[28]

Then, the information on the data summary sheets was keypunched by another organization under contract with the Commission and was read into a Commission computer program which produced a printout of the information previously coded.[29] The printout was reviewed but only about fifty individual accident reports were checked against their summaries on the computer printout.[30]

At this point, there were 10,765 separate line items;[31] each line item represented a separate report. Tracor next undertook a duplication search. The duplication search was carried out by selecting a particular category of information and grouping the reports according to a common parameter within that category. For example, the accidents reported were grouped by the states in which they occurred; they were also grouped alphabetically by the initials of the victim; listing model numbers consecutively constituted another method. After grouping, summaries exhibiting the same classifying parameters were inspected for other similarities. When the comparison indicated that the reports might be related, the original accident reports were examined.[32] As a result of this endeavor, separate reports of the same incident were consolidated and exact duplicates were eliminated. This winnowing procedure reduced the number of accident reports to 7,620.[33]

28. *Id.* pp. 216-20. It was not considered necessary to review every data sheet. *Id.* p. 219.

29. At least 99 percent of the accident reports summarized on the computer printout were obtained through the subpoenas duces tecum. *Id.* p. 247.

30. *Id.* p. 112.

31. *Id.* p. 221.

32. *Id.* pp. 223-225.

Tracor also classified as confidential the identity of the victim and any documents encompassed by the work product doctrine and the attorney-client privilege.[34] This information, therefore, has been excluded from the filed accident reports and computer printout.[35]

A Commission consultant, Robert A. Yereance, prepared a report captioned "Analysis of TV Accident Data" [36] ("Yereance Report"), the purpose of which was stated to be as follows:

> "To assist in the processing of the TV-related accident data and to analyze and summarize the data following completion of the data processing, the Commission hired a consultant, Robert A. Yereance. Mr. Yereance has prepared for the benefit of the offeror which has been selected to develop a TV standard, a report entitled, 'Analysis of TV Accident Data.' This report, which is based upon the accident data submitted to the Commission by the manufacturers, analyzes that data in terms of the number of television sets in use in the United States and the relative incidence of television-related accidents. The report does not identify a particular manufacturer, TV model, or chassis; it contains only industry-wide statistics. The

33. Newman Aff'd, par. 17.

34. *Id.* par. 15(c).

35. *Id.* par. 17.

36. Docket Item 41, C. A. No. 75-104. The temporary restraining order initially covered the Yereance Report. See note 4, *supra*. However, subsequent modification of that order (Docket Item 34, C. A. No. 75-104) provided that the Yereance Report, absent objection from plaintiffs, could be forwarded to Underwriters Laboratories, Inc. and those individuals assisting that organization in the development of safety standards.

purposes of this report were to answer basic questions concerning TV-related hazards to provide a picture of the magnitude or relative significance of hazards that exist in TV sets currently in use, and to point out information which should prove valuable in the development of a standard to reduce hazards." [37]

The requirement that manufacturers submit reports of dubious validity apparently reflected the Commission's concern that limiting the subpoenas to only verified reports would result in a data base which would be too small for proper analysis.[38] Also, it was thought that trends indicating design inadequacies of a particular manufacturer might appear.[39] However, the Commission never attempted to distinguish the verified reports from the unverified reports.[40] Indeed of the more than 7,600 tabulated reports, the Commission investigated less than 100 of them.[41]

Furthermore, the confusion generated by the lack of a clear definition of "TV-related accident" [42] is aptly reflected in the following dialogue between counsel for RCA and the Commission's project manager, Robert L. Northedge:

"Q. [By Mr. Tiger] Mere speculation is enough to characterize it as a TV-related accident?

A. [By Mr. Northedge] For the purposes for which we subpoenaed this information, yes.

Q. Is it proper to characterize as a TV-related accident the situation where someone is watching tele-

37. Newman Aff'd, par. 18.
38. *Id.* par. 9; Northedge Dep. pp. 169, 200, 258.
39. Northedge Dep. pp. 242-43.
40. *Id.* p. 262.
41. *Id.* p. 43.
42. See note 19 *supra*.

vision while smoking a cigarette and the lit cigarette falls in the cushioning of a chair and starts a fire?

(Whereupon, the reporter read the pending question.)

THE WITNESS: I wouldn't think that would be proper.

Q. [By Mr. Tiger] What if, during the fire, the TV caught on fire?

A. [By Mr. Northedge] It would be classified as a TV-related accident.

Q. Is it proper to characterize as a TV-related accident the situation where a fire results from defective wiring in the house and the point of origin of the fire happens to be in the area of the television set?

A. Yes, because it is possible that the TV could have—we don't know, but it is possible that the TV could have caused the short circuit in the wall outlet.

Q. What if the TV didn't cause the short circuit in the wall outlet, it was caused by something else?

A. Well, in many cases we don't know this so it is entered as a TV-related fire.

Q. Is it proper to characterize as a TV-related accident, the situation where a burning candle sitting on top of a television set melts the cabinet?

A. Yes." [43]

Thus, it appears that an accident which would have been "TV-related" in one view could feasibly be perceived by another as not being "TV-related." That the Commission was well aware of the confusion and its consequences is

43. Northedge Dep. pp. 120-21. The following would also be classified as "TV-related accidents": cutting a finger on a screw protruding from a TV cabinet, *id.* p. 35; sustaining a hernia while carrying a TV set, *id.* pp. 35, 116; fire caused by a candle that had been placed on top of a TV cabinet, *id.* pp. 172-73.

clearly reflected in an internal memorandum which reads in part:

> "It should be noted that some manufacturers appear to have submitted accident reports pertaining to fire and shock incidents only. Whereas, other manufacturers have submitted incident reports on TV tube implosions, carrying handle failures; (sic) instability of TV stands, etc., as well as incident reports on fire and shock." [44]

Moreover, although some manufacturers did not comply fully with the subpoena, the Commission never made any effort to compel the appropriate response [45] because it had made "a technical judgment that sufficient information [had] been collectively submitted by the sixteen manufacturers to significantly facilitate the Commission's regulatory development activities for TV receivers." [46]

Finally, the Commission's disclaimer accompanying the release to the public of the data submitted by manufacturers who are not parties to these actions focused on another critical source of inaccuracy:

> "The television accident statistics being released to you may be misleading because some television manufacturers were more conscientious then (sic) others in maintaining television accident files." [47]

44. Bureau of Engineering Sciences of the Commission, "Report on Subpoena Compliance," Dec. 3, 1974 (Docket Item 11A, Ex. B, C. A. No. 75-136).

45. Northedge Dep. pp. 259-61.

46. Memorandum of Robert L. Northedge to Enid Rubenstein of the Commission, December 3, 1974 (Docket Item 11A, Ex. B, C. A. No. 75-136).

47. Newman Aff'd, par. 28. "It is recognized that some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases, i.e., a higher accident rate for one particular TV model than similar models because more complete records were maintained." Cull Memorandum, p. 7.

Notwithstanding this melange of inaccuracies, the Commission reached a final decision on March 28, 1975 [48] to release to the public the TV-related accident data and the computer printout compiled from the information obtained from the plaintiffs.[49] In deciding to release this information to the public, the Commission relied [50] upon a memorandum [51] prepared by its Office of General Counsel. The reasons for the disclosure are not clearly and explicitly set forth in this memorandum. However, it does state,

48. Newman Aff'd, par. 19. The Commission on August 21, 1974 apparently had promised the plaintiffs that the Secretary would first make an initial determination of the disclosure issues and that the Secretary's decision could be appealed to the Commission. *E.g.*, Letter of Sadye E. Dunn, Secretary of the Commission to H. B. Walden, General Electric Co., August 2, 1974 (Docket Item 11A, Ex. A-5, C. A. No. 75-136). Despite this promise, the decision on disclosure was made by the Commission initially and the possibility of an appeal was foreclosed. See Cull Memorandum, p. 4. Thus, no hearing was held on the claims asserted by the plaintiffs. Furthermore, the letter notifying the plaintiffs of the Commission's decision to release the accident data provided only for a minimum of ten days before disclosure. *E.g.*, Letter of Vince DeLuise, Freedom of Information Director of the Commission to Merle W. Kremer, GTE Sylvania Inc., April 8, 1975 (Docket Item 35, C. A. No. 75-104). Telegrams from the Commission eventually fixed May 1, 1975 as the proposed date of disclosure (Docket Item 11A, Exs. A-8, A-9, C. A. No. 75-136).

49. These materials will be referred to as "information" or "accident data." The Commission evidently does not intend to release the technical information that it obtained from the plaintiffs. Newman Aff'd, par. 20; Docket Item 42, p. 53, C. A. No. 75-104. After the decision to disclose was reached by the Commission, the Yereance Report was prepared.

50. Newman Aff'd, par. 19.

51. Cull Memorandum. A copy of this memorandum is included in what the Commission terms its administrative record in each case. *E.g.*, Docket Item 35, C. A. No. 75-104.

"The release of the acident data would assist consumers to better evaluate the safety of TVs." [52] No other affirmative reason in support of disclosure was offered.[53]

In her affidavit of June 27, 1975 submitted during the course of this litigation, the Commission's Vice Chairman also asserted that "disclosure of the information would serve the important purpose of informing the public that hazards may exist in operating television receivers," and "would provide consumers with an indication of the kinds of questions that they should consider when purchasing a television set" and "that the large data base of TV-related accidents that [the Commission] had compiled would be useful to other parties interested in investigating the potential hazards associated with television receivers." [54]

On the other hand, the numerous sources of inaccuracy compelled the Commission's consultant, Robert A. Yereance, to disagree with the Commission's decision to disclose the data. According to Northedge, "he didn't feel that much of it should be released at all." [55] Furthermore, even Northedge concluded that the public could not meaningfully utilize the data as a valid basis for comparing the

52. *Id.* p. 5. Also the Commission's letter informing the plaintiffs of its disclosure decision mentioned "public health and safety" as a reason for disclosure. *E.g.*, Letter of DeLuise, Freedom of Information Director of the Commission to Merle W. Kremer, GTE Sylvania, Inc., April 8, 1975 (Docket Item 35, C. A. No. 75-104).

53. The bulk of the memorandum purports to establish that the Commission can release the data to the public under the Freedom of Information Act, 5 U. S. C. § 552. The impact of the Freedom of Information Act on the present actions will be discussed later in this opinion. See notes 73-76 and accompanying text, *infra*.

54. Newman Aff'd, par. 29. The propriety of considering these justifications raised initially in these proceedings is considered later. See notes 64 and 71 and accompanying text *infra*.

55. Northedge Dep. p. 146.

safety of the various manufacturers' televisions.[56] In sum, it is apparent that the information obtained from the plaintiffs which the Commission proposes to release would be misleading to the consumer who attempted to use it for evaluating the relative safety of TV receivers manufactured by the plaintiffs.

II. Plaintiffs' Contentions.

The manufacturers have made numerous arguments in support of their contentions that disclosure of this information would be improper and that issuance of a preliminary injunction prohibiting disclosure would be appropriate.[57]

56. *Id.* pp. 179, 256. This point was conceded by the defendants at oral argument (Docket Item 42, p. 74, C. A. No. 75-104). Northedge's final comments at his oral deposition clearly show that he, as project manager, could discern no benefit to the public of such disclosures. For example (Northedge Dep. pp. 276-277):

> "Q. [By Mr. Palmer] Well, you have previously testified that the data is not meaningful as a basis for consumers to make comparative safety assessments among the different manufacturers. What purpose is served by the release of the identity of particular manufacturers other than to facilitate such a concededly invalid comparison?
>
> A. [By Mr. Northedge] I don't know what purpose there would be.
>
> Q. In other words, you can't think of any purpose that would be served by that?
>
> A. Offhand, I cannot think of any purpose."

The Commission has offered plaintiffs the opportunity to come forward with information that would "substantiate" their claims of inaccuracy or duplication. Aff'd of Sheldon D. Butts, Assistant Secretary of the Commission, par. 2 (Docket Item 35, C. A. No. 75-104); Newman Aff'd, par. 27.

57. Although the manufacturers individually have raised different issues and stressed different arguments, their contentions are considered collectively. Also, while raising the same general issue individual plaintiffs may have emphasized uniquely perceived nuances. Therefore, even though the principal arguments are indicated, the list should not be viewed as an all inclusive catalogue.

First, the plaintiffs assert that release of the information is prohibited by 15 U. S. C. § 2055(a)(2) which provides that information obtained by the Commission which "relates to a trade secret or other matter referred to in section 1905 of Title 18 shall be considered confidential and shall not be disclosed." The accident reports are viewed as being within a protected category.

Second, the Freedom of Information Act, 5 U. S. C. § 552, and 15 U. S. C. § 2055(a)(1) which refers to the FOIA are perceived as conferring upon the plaintiffs an affirmative right to block public release of the information.

Third, the Commission is charged with having violated 15 U. S. C. § 2055(b)(1) which in part requires the Commission to "take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the Act]."

Fourth, the manufacturers challenge the procedure followed by the Commission in deciding to release the data. The Commission is said to have failed to promulgate rules to accommodate its information dissemination functions as required by FOIA, 5 U. S. C. § 552(a)(1), and to have failed to provide notice thirty days prior to public disclosure of the information and to supply a summary of the information destined for disclosure as mandated by 15 U. S. C. § 2055(b)(1), and to have failed to comply with an earlier promise of an administrative appeal.

Fifth, the plaintiffs maintain that the Commission is estopped from disclosing the information because of the Commission's representation to the manufacturers that the material obtained would not be made public.

Finally, an accusation of having violated the Due Process Clause of the Fifth Amendment is brought against the Commission. This constitutional argument is founded upon both alleged procedural deficiencies and the arbitrary nature of the Commission's decision to make public the previously confidential information.

III. Jurisdiction and Scope of Review.

Although the plaintiffs have pleaded several jurisdictional grounds,[58] the Court finds that it has jurisdiction of this matter by virtue of 28 U. S. C. § 1337, which provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ."

First, the general purpose of the Act to protect individuals who use consumer goods suggests a Congressional intention to regulate commerce.[59] Second, and more importantly, the regulation of commerce aspect of this legislation was explicitly set forth in 15 U. S. C. § 2051(a)(6).

> "The Congress finds that—
>
> • • •
>
> regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter."

58. Among the asserted bases for jurisdiction are 28 U. S. C. §§ 1331, 1332, 1346, 1361, 2201-02 and 5 U. S. C. §§ 702, 704. While some plaintiffs failed to mention the source of jurisdiction upon which the Court relies, it is nevertheless appropriate for the Court to recognize the applicability of § 1337 to those plaintiffs' claims. *Cf. Sun Printing & Publishing Ass'n v. Edwards*, 194 U. S. 377, 24 S. Ct. 696, 48 L. Ed. 1027 (1904).

59. *See, e.g.*, S. Rep. No. 835, 92d Cong., 2d Sess. 7 (1972); H. R. Rep. No. 1153, 92d Cong., 2d Sess. 21-24, 26-27 (1972), U. S. Code Cong. & Admin. News 1972, p. 4573.

Thus, it is clear that the Act can be included under the umbrella of § 1337.[60] Furthermore, § 1337 constitutes an appropriate basis for the review of an administrative determination. *Davis v. Romney,* 490 F. 2d 1360 (C. A. 3, 1974); *General Motors Corp. v. Volpe,* 457 F. 2d 922 (C. A. 3, 1972), *aff'g* 321 F. Supp. 1112 (D. Del. 1970).

Closely akin to the issue of jurisdiction is the question of plaintiffs' standing to seek the requested relief.[61] First, adverse publicity and harm to commercial reputation which would likely result from the proposed disclosure would amount to "injury in fact." Second, the requirements of 15 U. S. C. § 2055(b)(1) that the Commission take reasonable steps to assure accuracy and that disclosure be fair in the circumstances reflect a concern for the impact that inaccuracies and misleading public releases might have on manufacturers whose products were being investigated by the Commission. Thus, the interests which the plaintiffs seek to preserve are "arguably within the zone of interests to be protected" by 15 U. S. C. § 2055(b)(1). *Data Processing Service v. Camp,* 397 U. S. 150, 151-154, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970); *Merriam v. Kunzig,* 476 F. 2d 1233 (C. A. 3, 1973), *cert. den. sub nom. Gateway Center Corp. v. Merriam,* 414 U. S. 911, 94 S. Ct. 233, 38 L. Ed. 2d 149.

Judicial review of administrative actions, of course, is governed by the Administrative Procedure Act, specifically

60. It should also be noted that when the Act was codified in the United States Code, it was placed in Title 15, which deals with trade and commerce.

61. See also 5 U. S. C. § 702 (Administrative Procedure Act) which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U. S. C. §§ 701-706.[62] It is clear "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner,* 387 U. S. 136, 140, 87 S. Ct. 1507, 1511, 18 L. Ed. 2d 681 (1967). No statute prohibits review of Commission action, and nothing has been found to suggest that Congress intended to confer upon the Commission unreviewable discretion as defined in 5 U. S. C. § 701 (a)(2), a provision which has been given a very narrow interpretation. *E.g., Adams v. Richardson,* 156 U. S. App. D. C. 267, 480 F. 2d 1159 (1973). Because the Commission plans no further proceedings before releasing the data, the finality requirement has also been satisfied.

Although plaintiffs are requesting a preliminary injunction, this action, nevertheless, amounts to a review of an administrative determination, and while the heavey [sic] burden imposed on a party seeking a preliminary injunction must be met fully, it is still necessary to define with some precision the scope of review open to this Court.

The appropriate scope of review of the Commission's decision to disclose the accident data is defined in 5 U. S. C. § 706(2)(A):

> "The reviewing court shall—
>
> • • •

62. 5 U. S. C. § 701(a) provides:

> "This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law."

5 U. S. C. § 704 provides in part:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discetion [sic], or otherwise not in accordance with law."

Thus, the Court can prevent disclosure of accident data only if the Commission's actions fall beyond the permissible discretionary range defined by the "arbitrary and capricious" standard. *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402, 413-15, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971); *Camp v. Pitts*, 411 U. S. 138, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973); *A. O. Smith v. FTC*, 403 F. Supp. 1000 (D. Del., filed September 22, 1975).[63] In *Overton Park, supra*, at 416, 91 S. Ct. 814, 823, district courts were instructed that in applying the "arbitrary and capricious" standard, they "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Furthermore, "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* See *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 285-86, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974). Therefore, although the Court must review the events below with great care, the plaintiffs, nevertheless, must make a clear and convincing showing that the Commission erred and exceeded the bounds of its discretion in deciding to release the accident data.

63. The only other conceivable standards are the "de novo" review provided for by 5 U .S. C. § 706(2)(F) and the "substantial evidence" test of 5 U. S. C. § 706(2)(E). Both *Overton Park, supra*, and *Camp v. Pitts, supra*, make it clear that these approaches are not applicable here. See *A. O. Smith, supra* at 1005.

Also, it is necessary to determine what materials may be considered in reviewing the Commission's actions. "In applying [the 'arbitrary and capricious'] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts, supra* 411 U. S. at 142, 93 S. Ct. at 1244. This language, the Commission contends,[64] precludes consideration of the Northedge Deposition and the affidavits submitted by both the plaintiffs and defendants. However, in both *Camp v. Pitts, supra* at 142-143, 93 S. Ct. 1241, and *Overton Park*,[65] *supra* 401 U. S. at 420, 91 S. Ct. 814, the Supreme Court recognized that there are occasions when the reviewing court is justified in going beyond the limited administrative record. Although an inquiry of this nature should, as a general rule, be avoided, *United States v. Morgan*, 313 U. S. 409, 422, 61 S. Ct. 999, 85 L. Ed. 1429 (1941); *South Terminal Corp. v. EPA*, 504 F. 2d 646, 675 (C. A. 1, 1974); *National Nutritional Foods Ass'n v. FDA*, 491 F. 2d 1141 (C. A. 2, 1974), *cert. den.* 419 U. S. 874, 95 S. Ct. 135, 42 L. Ed. 2d 113, it is essential in this case in order for the Court to have sufficient information to consider rationally the Commission's actions. *See Nuclear Data, Inc. v. AEC*, 364 F. Supp. 423, 425 (N. D. Ill. 1973).[66]

64. Memorandum in Support of Defendants' Motions for Summary Judgment and Opposition to Plaintiff's (sic) Motions for Preliminary Injunction at 8-9, n. 1 (Docket Item 35, C. A. No. 75-104).

65. The present proceeding, as did *Overton Park, supra*, involves agency action that cannot be classified as either adjudicatory or rule making. See *Texas v. EPA*, 499 F. 2d 289, 296 (C. A. 5, 1974).

66. In somewhat similar circumstances, a district court has been ordered to hold an evidentiary hearing before applying the "arbitrary and capricious" standard. For example, in *Charles River Park "A", Inc. v. HUD*, 519 F. 2d 935 (C. A. D. C., 1975), the plaintiffs sought to prohibit HUD from disclosing to Boston's

Three sources of information not found in the record [67] have been offered to the Court; the deposition of the Commission's engineer and accident data program manager, Robert L. Northedge; the affidavit of Vice Chairman Newman; and affidavits of officers of the plaintiffs.[68] Proper analysis of the uses of the Northedge Deposition and Newman Affidavit in these proceedings requires that descriptions of the data and the Commission's procedure for processing the data be separated from possible explanations of the Commission's decision to release the accident data. Before it can reasonably apply the appropriate legal standards, the Court must first be apprised of the nature of data collected, the value of the data and computer printout to someone studying TV-related accidents, and the means by which the Commission collected and processed the data. The Northedge Deposition and the first twenty-eight paragraphs of the Newman Affidavit provide that information. Neither probing the mental processes of the Commission's officials nor seeking knowledge outside the Commission's own limited sphere is involved.

66. (Cont'd.)
Commissioner of Assessing certain financial information that had been submitted during the course of securing FHA-insured mortgages. The Court of Appeals instructed the reviewing court to conduct an evidentiary hearing but also ordered the review to be carried out under the "abuse of discretion" provision, also under 5 U. S. C. § 706(2)(A), which the Court for convenience referred to as the "arbitrary and capricious" standard. *Cf. Maryland-National Capital Park & Planning Comm. v. U. S. Postal Service*, 159 U. S. App. D. C. 158, 487 F. 2d 1029 (1973).

67. The "record" here encompasses more than the materials contained in the Commission's purported official record. Internal Commission memoranda and even plaintiffs' communications to the Commission can be examined to determine if the Commission should have been aware of certain issues.

68. The affidavits submitted by the plaintiffs are essential to establish irreparable harm required before a preliminary injunction can be issued. However, the Court has not considered plaintiffs' affidavits in evaluating the propriety of the Commission's actions.

On the other hand, paragraph 29 of the Newman Affidavit cannot be considered because it constitutes the most egregious type of "post-hoc rationalization" condemned in *Burlington Truck Lines v. United States*, 371 U. S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962), and *SEC v. Chenery Corp.*, 318 U. S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943). The record suggests and the Newman Affidavit clearly states that the Commission relied upon the Cull Memorandum in reaching the decision to disclose the accident data.[69] This memorandum offers the only substantially contemporaneous explanation for the decision.[70] The

69. Newman Aff'd, par. 19.

70. It should be noted that the Cull Memorandum does not discuss all legal arguments offered to the Commission in opposition to disclosure. However, in an informal administrative proceeding, it is not mandatory that the substantially contemporaneous writing relied upon and adopted by the Commission specifically reject every contention. *Cf. Consumers Union of the United States v. Consumer Product Safety Commission*, 491 F. 2d 810, 812 (C. A. 2, 1974).

The picture is further clouded by the Commission's failure to comply with its representation to the manufacturers that the Secretary would make the initial determination which in turn could be appealed to the full Commission. See note 48, *supra*. Deviations from ideal procedure have been viewed as a basis for relaxing the typically close confinement to the administrative record. *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971).

Denial of promised administrative appeal and the general inadequacy of the record as a factual basis for review have caused the Court to consider remanding the proceedings to the Commission. *See, e.g., Secretary of Labor v. Farino*, 490 F. 2d 885, 890-893 (C. A. 7, 1973); *Shannon v. HUD*, 436 F. 2d 809 (C. A. 3, 1970). Both *Overton Park, supra*, and *Camp v. Pitts, supra*, conferred broad discretion without much guidance on the district courts to determine the appropriate procedures for clarifying the administrative record. *A. O. Smith, supra* at 1012. Under the circumstances—a recently formed agency engaged in an informal proceeding—it does not seem necessary to remand the matter to the Commission. The Northedge Deposition and portions of the

other purposes set forth in the Newman Affidavit are "post-hoc rationalizations" which the Court is precluded from considering as a basis for administrative decision.[71]

IV. Preliminary Injunction.

Before preliminary injunctive relief may be granted, plaintiffs must show (1) a reasonable probability of eventual success on the merits and (2) that they will suffer irreparable harm *pendente lite* if relief is not granted, and, furthermore, the Court must consider (3) the impact of its decision on other interested persons and (4) the public interest. *Oburn v. Shapp*, 521 F. 2d 142, 147 (C. A. 3, 1975); *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.*, 501 F. 2d 917, 919-20 (C. A. 3, 1974); *A. O. Smith Corp. v. FTC*, 396 F. Supp. 1108, 1117-20 (D. Del. 1975) (appeal pending); *Bowers v. Columbia General Corp.*, 336 F. Supp. 609, 613 (D. Del. 1971).

A. Reasonable Probability of Eventual Success.

"It is not necessary that the moving party's right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to make a *prima facie* case showing a reasonable probability that it will prevail on its merits." *Oburn v. Shapp, supra*, at 148.

Congressional interest in securing manufacturers' cooperation[72] and establishing a harmonious but effective

70. (Cont'd.)
Newman Affidavit provide the Court with an adequate foundation for decision. Indeed, if these sources could not be used, it would be necessary to remand the case to the Commission with instructions to describe in detail the procedure followed in obtaining and processing the data.

71. The Court does consider these arguments when it evaluates the public interest in denying or granting preliminary injunctive relief. See IV C, *infra*.

72. *See, e.g.*, 118 Cong. Rec. 31378-79 (1972) (remarks of Representative Moss).

relationship between the manufacturers and the Commission is reflected in 15 U. S. C. § 2055(b)(1), which provides in pertinent part:

> "The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, [1] that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and [2] that such disclosure is fair in the circumstances and [3] reasonably related to effectuating the purposes of [the Act]."

Thus, before the Commission may release information to the public, a three step analysis must be satisfied. Failure to comply with any one of the standards means that disclosure would be improper.

At the outset, the Court is confronted by the Commission's oblique suggestion that § 2055(b)(1) may never apply where the information has been requested under the Freedom of Information Act, 5 U. S. C. § 552.[73] However, separate statutes regulating disclosure decisions of administrative agencies do have a significant and independent role. *FAA v. Robertson*, 422 U. S. 255, 95 S. Ct. 2140, 45 L. Ed. 2d 164 (1975). In *Robertson*, in spite of the language of the FOIA exception protecting matters "*specifically* exempted from disclosure by statute," 5 U. S. C. § 552(b)(3) (emphasis added), a statute[74] granting an agency discretion to withhold or release safety information

73. Memorandum in Support of Defendants' Motion for Summary Judgment and Opposition to Plaintiff's (sic) Motions for Preliminary Injunction, 14, n. 4 (Docket Item 35, C. A. No. 75-104). FOIA requests for the accident data have been received by the Commission. Newman Aff'd, pars. 11-14, 20.

74. 49 U. S. C. § 1504.

to the public was found to have continuing viability.[75] The Supreme Court acknowledged that "Congress could appropriately conclude that the public interest was better served by guaranteeing confidentiality in order to secure the maximum amount of information relevant to safety." *Robertson, supra,* 422 U. S. at 267, 95 S. Ct. at 2149.

To argue that § 2055(b)(1) becomes irrelevant during the pendency of a FOIA demand is to ignore a clear Congressional concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer. Congress was aware that FOIA requests for information gathered by the Commission would be forthcoming [76] but, nevertheless, imposed affirmative obligations on the Commission which cannot flippantly be avoided.

First, the Commission is charged with the duty of taking "reasonable steps to assure," before disclosure, the accuracy of information from which the identity of the manufacturer can be readily ascertained.[77] It must be emphasized that the Commission is not a guarantor of the

75. Indeed, the problem of "repeal by implication" facing the Supreme Court in *Robertson*, 422 U. S. at 265-66, 95 S. Ct. 2140, is not present here because the FOIA (1966) was enacted before the Act (1972). The 1974 FOIA amendments, P. L. No. 93-502, did not alter the FOIA's impact in these circumstances.

76. *E.g.*, Hearings on H. R. 8110, H. R. 8157, H. R. 260 (and identical bills) and H. R. 3813 (and identical bills) Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st & 2d Sess. 897-98 (1972) (statement of Mr. Nader).

77. Because the manufacturers are expressly identified, it is not necessary to delineate the contours of the "readily ascertainable" standard of § 2055(b)(1). Each accident report is in a separate file that contains, inter alia, the manufacturer's name. Newman Aff'd, par. 17. The computer printout also identifies the manufacturer whose product allegedly generated that line item. Cull Memorandum, p. 2.

accuracy of the information which it releases; [78] to require the Commission to prove that its materials are accurate would raise an insurmountable barrier to disclosure. Instead, an affirmative obligation to "take reasonable steps to assure" that information which it releases is accurate has been imposed on the Commission.[79] To determine whether the Commission complied with the requirement, the Court must consider both the means selected to gather the data and the procedure employed to process the data.

The Commission strenuously argues that its method fulfilled the statutory mandate of taking reasonable steps for assuring accuracy, but it is difficult to accept this contention on review of the Commission's data-gathering activities.[80] The company that submitted only accurate re-

78. However, H. R. Rep. No. 1153, 92d Cong., 2d Sess. 32 (1972) states that "the Commission has a responsibility to assure that the information which it disseminates is truthful and accurate."

79. The Report of the House Committee on Interstate and Foreign Commerce suggests the underlying rationale for restricting the Commission's discretion to disclose data that it has collected.

> "If the Commission is to act responsibly and with adequate basis, it must have complete and full access to information relevant to its statutory responsibilities. Accordingly, the committee has built into this bill broad information-gathering powers. It recognizes that in so doing it has recommended giving the Commission the means of gaining access to a great deal of information which would not otherwise be available to the public or to Government. Much of this relates to trade secrets or other sensitive cost and competitive information. Accordingly, the committee has written into section 6 [15 U. S. C. § 2055] of the bill detailed requirements and limitations relating to the Commission's authority to disclose information which it acquires in the conduct of its responsibilities under this act." H. R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972).

80. The Court does *not* suggest in any way that issuing subpoenas duces tecum for all accident data—accurate or inaccurate—was improper. The Commission is the best judge of what is needed for its own internal purposes. In fact, the limitations on disclosure of 15 U. S. C. § 2055 which protect manufacturers enhance the argument for conferring broad subpoena powers on the

ports would not have complied with the requirements of the subpoena because production of all reports—verified or unverified—was ordered by the Commission. One is at a loss to understand how demanding submission of inaccurate data constitutes a reasonable step in assuring the accuracy of information which it will eventually disclose.

The Commission, however, argues that since the reports were submitted by the manufacturers, it cannot be held responsible for the accuracy of the reports. This attempt to shift responsibility for assuring accuracy fails because the duty to take reasonable steps for assuring accuracy was placed on the Commission—not the manufacturers. There is no indication that Congress sought to require manufacturers to investigate each accident report received.[81]

Furthermore, the word "information" as used in § 2055(b)(1) embodies a concept of more than just empirical data. It is especially important to be aware of the impression that will be created by release of the data when the primary purpose for disclosure is to enable comparative safety shopping. Ambiguities in the definition of "TV-related accident" caused some manufacturers to submit

80. (Cont'd.)
Commission. If manufacturers do not have to fear the adverse effects of inaccurate Commission releases, they will be less likely to resist efforts to obtain accident data essential for the Commission's safety standard efforts.

81. Because a manufacturer does not have a duty to investigate accident reports, the Commission's gratuitous offer to allow the manufacturers to challenge the validity of individual accident reports (Aff'd of Sheldon D. Butts, Ass't Secretary of the Commission, par. 2, Docket Item 35, C. A. No. 75-104) does not satisfy the Commission's statutorily imposed duties. The Commission also asserts that it has faithfully satisfied its statutory obligation by merely passing on without error the data submitted by the manufacturers. This argument also ignores the fact that it is the Commission which has the responsibility of striving to make its releases accurate.

only reports of fires and electrical shocks while other manufacturers submitted all accident reports. The Commission was made aware of this potential confusion before it issued its subpoenas but, apparently, refused to take any steps to ameliorate the situation. Furthermore, the Commission never sought to remedy the incomplete responses of some manufacturers to the subpoenas[82] even though the Commission had ample powers to compel compliance. 15 U. S. C. § 2076(c). Clearly defining the data that it sought and seeking full compliance with its subpoenas were but two reasonable steps which the Commission could have taken to assure that the information was accurate.[83]

On the other hand, the procedures followed by the Commission in processing the raw reports were reasonable for assuring accuracy of the information gathered. The careful initial supervision and later random checks were adequate to assure proper transfer of the data obtained to the summary sheets.[84] It appears that standard practices were followed in keypunching and obtaining the computer printout. Finally, while the manufacturers contend that not all duplicates were eliminated,[85] the duplication search

82. Evidently, varying degrees of compliance did not bother the Commission because it believed that it had obtained sufficient data to enable it to begin the process of defining safety standards. (Northedge Dep. p. 260).

83. On the other hand, the uneven quality of record-keeping among the manufacturers was beyond the control of the Commission. While the company which had the best record-keeping operation would, in effect, be punished for its efforts, no reasonable steps were open to the Commission to correct the source of misleading impressions.

84. The data processing phase is described in the text accompanying notes 24-35, *supra*.

85. *E.g.*, Affidavit of John F. Eisenmann, Manager, Consumer Technical Affairs, Aeronutronic Ford Corp., pars. 7, 10 (Docket Item 22, C. A. No. 75-116). Perhaps it is inappropriate to consider these affidavits because, as indicated at notes 64-71 and

also would seem to have been reasonable in the circumstances.

Second, before release of the TV-related accident data can be permitted, disclosure must be "fair in the circumstances." Fairness obviously is a concept that eludes precise definition. Because of the Commission's decision to subpoena unverified reports, the ambiguity of the subpoena, the failure of the Commission to seek compliance by all manufacturers and the differing quality of record-keeping, it is conceded that a comparison of the accident data to determine the relative safety of the various manufacturers' products would be improvident and misleading. However, the only caveat which the Commission proposes to release with the public disclosure relates to one source of error only—the differing qualities of record-keeping. Apparently, nothing will reflect the other sources of possible error.

Basically, the Commission proposes to release information that could unjustifiably damage [86] the manufacturers because the data does not form a reliable foundation for safety comparison—the only contemporaneous reason given by the Commission for the release of the information. Moreover, the public would be misled by the Commission's efforts. Although fairness is difficult to define, it is even more difficult to determine how dis-

85. (Cont'd.)
accompanying text *supra*, they are not part of the administrative record. It is, however, unclear when the printouts were first made available to the companies. If the printouts were not released until after the Commission had made its decision, the companies would not have had any opportunity to comment in a timely fashion to the Commission on the official record. In light of the Court's conclusion on the substantive issue raised by the affidavit, it is not necessary to decide whether the allegation is properly before the Court.

86. The potential harm to plaintiffs is discussed at IV(B) *infra*.

closure of this information would be "fair in the circumstances." [87]

Third, it must be determined whether disclosure is "reasonably related to effectuating the purposes of [the Act]." Only one reason for disclosure was set forth in the contemporaneous Cull Memorandum upon which the Commission relied in deciding to release the information: "The release of the accident data would assist consumers to better evaluate the safety of TVs." [88] One of the purposes of the Act is "to assist consumers in evaluating the comparative safety of consumer products." 15 U. S. C. § 2051(b)(2). Therefore, if it were possible to use this information to contrast the safety records of the various

87. The Commission in attempting to reduce this data to an intelligible format has unintentionally aggravated the problem. A clear computer data listing, with its immediate impact, creates an impression of accuracy that far outshines several filing cabinets of jumbled accident reports.

Furthermore, despite the Commission's contentions to the contrary (Memorandum In Support of Defendant's Motion for Summary Judgment and Opposition To Plaintiff's (sic) Motions for Preliminary Injunction, p. 15, Docket Item 35, C. A. No. 75-104), the release of this information by a government agency carries with it an aura of authenticity which cannot be ignored in determining whether the disclosure is "fair."

88. Cull Memorandum, p. 5.

The administrative record indicates that this was the only contemporaneous explanation for the Commission's decision to disclose. See notes 52-53 and accompanying text *supra*. The "post-hoc rationalizations" of the Newman Affidavit, while not appropriate for consideration here, are addressed when the preliminary injunction issue of harm to the public is reached. See IV(B) *infra*.

The memorandum also urges disclosure in response to the "overriding health and safety issues involved." The Commission obtained the accident reports by early fall of 1974 but did not decide to release them until the spring of 1975. Thus, the Commission, by its own actions, has indicated that time is not of the essence. A generalized warning of the hazards encountered while watching television would not have required identification of the manufacturers. See note 93 *infra*.

manufacturers, disclosure would be reasonably related to achieving the goals of the Act. However, it is clear that the materials which the Commission proposes to disclose cannot aid consumers in determining which television manufacturer has the safest product, and therefore would not be "reasonably related to effectuating the purpose of [the Act]."

Accordingly, plaintiffs have convinced the Court that they have a reasonable probability of success in showing that the Commission failed to "take reasonable steps to assure" that the accident information would be accurate, that disclosure would not be "fair in the circumstances" and would not be "reasonably related to effectuating the purpose" of the Act.[89]

B. Irreparable Harm.

The plaintiffs aver, by way of verified complaint and affidavit,[90] that release of the data to the public would irreparably injure their goodwill and reputations by generating unwarranted adverse publicity. Furthermore, they contend that their competitive positions would be unfavorably affected by public disclosure of sensitive, confidential trade and commercial information.

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11 Wright & Miller, Federal Practice and Procedure § 2948, p. 431 (1973). The plaintiffs' reputations

89. In light of the Court's resolution of the issues raised under 15 U. S. C. § 2055(b)(1), it is not necessary to consider the other contentions urged by the plaintiffs for preliminary injunctive relief.

90. *E.g.*, Affidavit of Fred R. Wellner, General Manager, Television Receiver Products Dept., General Electric Co., pars. 4-14 (Docket Item 11A, Ex. A-Aff., C. A. No. 75-136).

would suffer substantially from the Commission's release of misleading safety information.[91] This risk is not merely speculative, and furthermore the irreparable nature of injury to commercial reputations has been widely recognized. *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189-90 (E. D. N. Y. 1972); *Cutler-Hammer, Inc. v. Universal Relay Corp.*, 285 F. Supp. 636, 639 (S. D. N. Y. 1968).

The information which the Commission proposes to release would not normally have been made public by the plaintiffs, and it appears that the data would appropriately be deemed confidential.[92] The planned disclosures would undoubtedly harm the plaintiffs by giving their competitors access to sensitive information.

Furthermore, once the information is disseminated, the Court becomes powerless to protect or to restore the status quo pending a final determination of the merits. A preliminary injunction is especially appropriate where the action sought to be enjoined would "impair the court's ability to grant an effective remedy." 11 Wright & Miller, Federal Practice and Procedure § 2948, p. 434 (1973).

Thus, the Court finds that disclosure as proposed by the Commission would irreparably harm the plaintiffs. *See Sims v. Greene*, 161 F. 2d 87 (C. A. 3, 1947).

C. Impact on Other Interested Persons and the Public Interest.

The Court must also consider the consequences of its decision on both interested persons and the public in gen-

91. "When the Government focuses adverse publicity on named parties, the consequences to such parties can be disastrous." Gellhorn, Adverse Publicity by Administrative Agencies, 86 Harv. L. Rev. 1380, 1381 (1973).

92. Plaintiffs also argued that the data constituted either trade secrets or other protected confidential information. The Court did not reach these issues and uses the word "confidential" here in a more colloquial sense.

eral. *Delaware River Port Authority v. Transamerican Trailer Transport, Inc., supra.* First, the Commission would not be significantly affected by issuance of a preliminary injunction preventing release of the accident data. The primary objective—obtaining enough data to be able to promulgate safety standards—has been achieved.

Second, in order for a preliminary injunction prohibiting disclosure to harm the public, disclosure first would have had to have been beneficial to the public. The Commission has urged that publicizing the information would assist the public in comparing the safety of various television models. However, it is clear that the data, subject to many potential sources of inaccuracy, simply cannot provide a rational basis for comparative safety shopping.

The Commission also asserts that disclosure would warn the public of hazards associated with the operation of televisions and would suggest questions to ask when purchasing a television, but these two goals could be achieved without releasing the identity of the manufacturers.

Finally, the Commission suggests that the data might be useful to other parties interested in investigating the safety of television receivers. First, the rather speculative benefit is not very significant when compared to the immediate and direct injury that would fall on the plaintiffs if the data were released to the public. Second, it is appropriate to recognize in deciding whether to grant temporary relief that the public interest in the safety investigation is being protected by an energetic and capable Commission investigation.

In sum, it is difficult to perceive how the public interest would be harmed by enjoining the disclosure of information of dubious accuracy.[93]

93. In their memoranda and at oral argument, the parties devoted little attention to the Yereance Report. See notes 36-37 and accompanying text, *supra*. Nevertheless, it appears that plaintiffs still seek to bar its release to the public (Docket Item 42, p. 3, C. A. No. 75-104).

The Yereance Report mentions the manufacturers twice. First, in parallel vertical columns the manufacturers and their respective Commission filing numbers are listed (A-7.) No accident information is revealed, and, furthermore, the filing numbers are not used elsewhere in the report. Second, the report describes the layout of the computer printout and indicates that the printout identifies the manufacturers (B-4.) The names of manufacturers who could be listed are set forth, and, of course, the plaintiffs are included. Again, no accident information is discussed in conjunction with mention of the manufacturers. Thus, while the Yereance Report is a sobering study of the physical dangers that one may encounter while watching television, the manufacturers are in no way singled out for special attention. There is nothing in the Yereance Report that relates or links accident data to a particular manufacturer.

Therefore, it appears that public dissemination of the Yereance Report would not harm the manufacturers. The absence of irreparable harm is an appropriate basis for declining to grant preliminary injunctive relief. *Commonwealth of Pennsylvania ex rel. Creamer v. United States Department of Agriculture,* 469 F. 2d 1387, 1388 (C. A. 3, 1972).

Furthermore, public interest considerations militate against enjoining disclosure. The Yereance Report represents a straightforward, easy to read document that can inform the public of television hazards. Balancing the benefits of the disclosure against the minimal adverse consequences that might affect the television manufacturing industry as a whole indicates that enjoining disclosure of the Yereance Report would be improper.

Thus, the Court will not issue a preliminary injunction prohibiting disclosure of the Yereance Report.

Accordingly, the Court finds that it is appropriate to preliminarily enjoin the disclosure to the public of the accident data and the computer printout.

This opinion shall constitute the findings of fact and conclusions of law required by Rule 52, F. R. Civ. P.

An order will be entered in accordance with this opinion.

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Preliminary Injunction.

On the basis of findings of fact and conclusions of law set forth in the Court's opinion of this date entered in these cases, it is

ORDERED

1. That pending final hearing and determination by the Court or until further order of the Court, the defendant, Consumer Product Safety Commission ("Commission"), its members, agents, officers, employees and all other persons in active concert and participation with them are hereby enjoined from disclosing to the public in any manner:

(a) Any data submitted by plaintiffs to the defendant Commission in response to a special order issued May 13, 1974;

(b) Any data submitted by plaintiffs to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

(c) Any report, extraction, computer analysis, or other document or documents purporting to be a summary or compilation of the data previously supplied to the Commission described in sub-paragraphs (a) and (b) above.

2. Provided, however, the Commission is not enjoined hereby from making certain limited disclosures to

Underwriters Laboratories, Inc. ("UL"), the entity retained by the Commission to develop safety standards for television receivers under 15 U. S. C. § 2056, upon the following terms and conditions:

(a) UL and those assisting in development of safety standards for television receivers shall be permitted access to computerized summaries of "accident reports" submitted to the Commission in response to the Commission's July 26, 1974 subpoena duces tecum (served on 16 television manufacturers) in a form that does not, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis. The computerized summaries shall contain no identifying symbols which will permit identification of "accidents" reported by a single manufacturer.

(b) For the sole purpose of developing safety standards for television receivers and not for public disclosure, the following employees of UL shall be permitted access to all of the "accident reports" and data submitted to the Commission by the 16 television manufacturers: Mr. S. David Hoffman, Mr. John Stevenson, Mr. Steven Coen and Ms. Frances Newell. These four employees of UL will make use of such "accident reports" and data only in connection with the development of safety standards for television receivers and will not disclose the "accident reports" or data nor make any written or oral reports of the contents thereof to any person other than an employee of the Commission. No other written or oral reports will be prepared by these four employees of UL, which will in any way, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of

"accidents" allegedly associated with any particular manufacturer, model or chassis.

3. Provided further, however, that the Commission is not enjoined hereby from public disclosure of the "Report on Analysis of TV Accident Data to Consumer Product Safety Commission," dated April 25, 1975 by Robert A. Yereance (the "Yereance Report") so long as that Report or any accompanying information does not in any way, directly or indirectly, identify the manufacturers, model or chassis number of any television receivers alleged to have been involved in any "accidents" allegedly associated with any particular manufacturer, model or chassis.

4. Copies of this preliminary injunction shall be furnished to Messrs. Hoffman, Stevenson and Coen, and Ms. Newell, and all others assisting UL in the development of safety standards for television receivers forthwith.

Dated: October 23, 1975.

/s/ JAMES L. LATCHUM,
Chief Judge

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Minute Order Termination.

A preliminary injunction was issued in the above case on October 23, 1975 and since the parties do not now know whether further action is contemplated in this litigation, there is no need to maintain these cases as open litigation for statistical purposes, therefore it is

ORDERED

1. The Clerk is hereby instructed to submit a JS-6 form to the Administrative Office and close these cases for statistical purposes.

2. Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered.

Dated: August 20, 1976.

/s/ JAMES L. LATCHUM
Chief Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

—

Civil Action No. 75-104

—

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

———

September 15, 1977

Memorandum Opinion.

LATCHUM, *Chief Judge.*

The plaintiffs in these twelve actions [1] are manufacturers of television receivers who seek to permanently enjoin the Consumer Product Safety Commission ("Commission"), its members and officers from releasing to the public certain television-related accident data which the plaintiffs contend is privileged, confidential, misleading and inaccurate. The accident data had been furnished to the Commission after it publicly requested and later issued subpoenas duces tecum pursuant to its authority under 15 U. S. C. § 2076(b)(3). However, this Court on October 23, 1975, after a hotly contested battle exemplified by the extensive briefs filed and oral arguments presented, entered a preliminary injunction enjoining the Commission's public release of the contested data pending a final hearing on the merits of the plaintiffs' contention. GTE Sylvania, Inc. v Consumer Product Safety Commission, 404 F. Supp. 352 (D. Del. 1975). The Commission's notice of appeal filed on December 12, 1975, with the Third Circuit was voluntarily dismissed on May 10, 1976, after the Solicitor General evidently concluded that it was unlikely under the circumstances that the Third Circuit could be persuaded to reverse this Court's decision to preliminarily enjoin disclosure. During the ensuing two years, the parties informally suspended activity in these actions apparently awaiting the final determination of a related issue in cases then pending in the District Court for the District of Columbia [2] and in the Western District of New York.[3] In July, 1977, the plaintiffs filed motions to make permanent the preliminary injunction.[4] The Commission responded by filing motions to vacate the preliminary injunction [5] and for summary judgment [6] and by moving to transfer these cases to the District Court for the District of Columbia pursuant to 28 U. S. C. § 1404 (a).[7] This opinion addresses only the question of the propriety of a transfer of these actions.

1. There were thirteen separate actions, but one suit, Teledyne Mid-America Corp. v. Consumer Product Safety Commission, C. A. No. 75-122, was voluntarily dismissed. Docket Item 63 in C. A. No. 75-122.

The federal transfer statute provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U. S. C. § 1404(a).

2. Consumers Union of the United States v. Consumer Product Safety Commission, C. A. No. 75-705 (D. D. C.).

3. Pierce & Stevence Chemical Corp. v. Consumer Product Safety Commission, C. A. No. 1975-410 (W. D. N. Y.).

4. Docket Item 51 in C. A. No. 75-104.

5. Docket Item 79 in C. A. No. 75-104.

6. Docket Item 80 in C. A. No. 75-104.

7. Docket Item 55 in C. A. No. 75-104.

In order to secure a change of venue the burden is upon the moving party to show that the action might have been brought in the District of Columbia and that the interest of justice and the convenience of the parties and witnesses require the transfer of these actions to the transferee district.[8]

There is no dispute that the plaintiffs had the right to initially bring these actions in the District of Columbia. The district court there would have personal jurisdiction over the Commission because it resides in the District of Columbia and because the "wrongful" conduct as alleged in the complaint occurred there; for the same reason, venue would be appropriate under 28 U. S. C. § 1391 (e)(1) or (2) which allows a civil action against an agency of the United States to be brought in the judicial district in which the agency resides or in which the cause of action arose. Thus the Court has the *power* to transfer.

Turning now to the criteria for transfer, the Commission does not contend that the convenience of the parties and witnesses requires a transfer of these actions to the District of Columbia. With commendable candor it conceded at oral argument that the convenience factor is in equipoise; a trial of these actions in this forum would be just as convenient for the parties and witnesses as trial in the District of Columbia.

Whether the transfer here sought is warranted under § 1404(a) must therefore be judged by the remaining statutory criteria of whether it is in the interest of justice. The Commission points to the fact that the Consumers Union of the United States, Inc. and Public Citizen's Health Research Group ("FOIA requesters") on May 5, 1975, after the original cases had been filed in this district,

8. Shutte v. Armco Steel Corp., 431 F. 2d 22 (C. A. 3, 1970), *cert. denied*, 410 U. S. 910 (1971).

brought an action[9] ("D. C. case") under the Freedom of Information Act ("FOIA") in the District Court for the District of Columbia against the Commission and twelve of the manufacturers who are plaintiffs in these actions seeking access to the same television accident reports which are the subject matter of this litigation. The D. C. case was dismissed on September 12, 1975. Consumers Union of the United States, Inc. v. Consumers Product Safety Commission, 400 F. Supp. 848 (D. D. C. 1975). In that case the District Court found that there was no "case or controversy" between the plaintiff and the Commission and that the complaint failed to state a claim against the television manufacturers upon which relief could be granted. Almost two years later, on July 5, 1977, the D. C. Court of Appeals reversed the District Court finding that there was a "case or controversy" between the FOIA requesters and the Commission because (1) there was disagreement between the parties as to the scope and effect of the Delaware proceedings, and (2) that the Delaware action had been dismissed in fact and had been dropped by the acquiescence of the parties. Consumers Union et al. v. Consumers Product Safety Commission, No. 75-2059 (Slip opinion D. C. Cir., decided July 5, 1977). Upon rehearing the D. C. Circuit Court, noting its erroneous assumption in its July 5, 1977, opinion that the Delaware cases had in fact been dismissed or dropped, nevertheless adhered to its prior decision that a case or controversy exists between the FOIA requesters and the Commission for the reason the Commission continues to refuse to produce the documents because of the preliminary injunction outstanding in this litigation. Consumers Union et al. v.

9. The FOIA requesters, although aware of the earlier filed Delaware cases, did not seek to intervene in the instant cases but for "strategic reasons" filed the D. C. suit instead. This Court, although aware of the FOIA requesters, was without power to bring them into the Delaware litigation involuntarily.

Consumers Product Safety Commission, No. 75-2509 (Slip opinion decided Aug. 25, 1977).

The Commission now argues from the history of the D. C. litigation that the Delaware and District of Columbia actions "have arrived at the same stage and are ready for a full hearing" and that a transfer from Delaware (1) would avoid the possibility of inconsistent results on the merits, (2) would bring all parties including the FOIA requesters, who have interests of disclosure and non-disclosure, together in one forum, and (3) would eliminate difficulties of the Commission in conducting pretrial discovery and duplicate trials in two fora.

First, the Court finds that the Commission has failed to meet its burden of showing that the D. C. case, which was later filed, is in about the same stage and posture as this litigation. In the present suits both parties have moved for summary judgment with accompanying main briefs, discovery has been practically completed, and following the determination of this transfer motion, briefing can be quickly completed and oral argument promptly held. More importantly, a voluminous record relating to the merits of this case is already before the Court having been filed in preparation of the hearings on the motions for a preliminary injunction which has since been supplemented by recent discovery procedures. In contrast, nothing towards the disposition of the merits has been accomplished in the D. C. litigation. The most recent development there is that the Court of Appeals on September 9, 1977, stayed its mandate until October 4, 1977, in order to give the television manufacturers an opportunity to petition for a Writ of Certiorari to the United States Supreme Court. Moreover, this Court has been advised that several of the television manufacturers have filed motions to dismiss on jurisdictional grounds which must be

first determined by the D. C. District Court before reaching the merits even if Certiorari is denied.[10] Thus, the present record clearly shows that this first filed litigation is much farther advanced towards final disposition of the merits than is the later filed D. C. litigation. These two factors distinguish this litigation from the situations in Jacobs v. Tenney, 316 F. Supp. 151, 167-171 (D. Del. 1970) and Hall v. Kittay, 395 F. Supp. 261 (D. Del. 1975). After comparing the posture of the litigation here with that in the D. C. Court, it is obvious that granting a transfer from Delaware would unduly delay a determination of the merits. After all, if the Commission is successful here on their present summary judgment motion or after trial if one is necessary, there would be no need to pursue the D. C. litigation since the Commission has stated that it is ready to disclose the accident reports.

The fact that the Commission will be required to proceed in two fora which may result in inconsistent orders on the merits is not an uncommon possibility, particularly when an action may not be transferred to another district in which similar litigation is pending because the action could not have been originally brought there. *See* Phillips Petroleum Company v. Federal Energy Administration, — F. Supp. — (D. Del. 1977) (slip opinion June 27, 1977). That possibility as well as duplicate trials, however, could be easily avoided now if the interested FOIA requesters, who instituted this D. C. action after the first cases were brought here, would voluntarily intervene in this litigation. What the Commission overlooks by their argument of inconsistent results and duplicate trials is that this possibility existed from the time the later D. C. suit was filed until the D. C. District Court dismissed that suit on September 12, 1975. The time for the Commission to have moved

10. Warwick Electronics, Inc. has moved in District of Columbia Court to dismiss for lack of jurisdiction because it did no business in the district.

for a transfer of these cases was in the early stages of this litigation in 1975 before all the effort and work had been expended here.

Furthermore, five of the plaintiffs here initially filed their actions in the district courts of New York [11] and Pennsylvania,[12] but all consented, at the urging of counsel for the Commission, to have their actions transferred and heard in this forum. The Commission expressly stipulated that this district was the "appropriate forum" even though a comparable law suit was then pending in the District of Columbia.

For this reason also the Court is not inclined, especially at this late date and after one transfer of five cases, to relieve the Commission of whatever additional burden it must bear as a result of past legal oversights. Furthermore, the Court does not believe that the burden is as onerous as the Commission implies. As previously noted, most of the discovery has been completed with respect to the primary legal issue raised in these actions; duplicative discovery can be further avoided merely by stipulations that discovery taken in connection with these actions can be used in the District of Columbia and by coordinating any discovery that remains to be taken.[13] Since the legal

11. Matsushita (C. A. No. 75-2040), Sharp (C. A. No. 75-2049) and Toshiba (C. A. No. 75-2050) filed actions in the Southern District of New York and General Electric (75-CV-189) filed suit in the Northern District of New York.

12. Admiral (C. A. No. 75-531) filed suit in the Western District of Pennsylvania.

13. This likewise answers the Commission's suggestion that unless a transfer is granted there exists a threat of inconsistent discovery orders issuing from this district and the District of Columbia court. Moreover, it is represented to the Court that little or no discovery has been taken in the District of Columbia litigation. If that representation is accurate, the threat of inconsistent discovery orders is even more illusory since, as already noted, most of the requisite discovery has already been taken in connection with the actions pending here.

issues are substantially the same, briefs and/or affidavits are likely to be similar and the only additional costs to the Commission will be filing papers in that district and sending an attorney to argue motions.

Finally, although the Court is not unmindful of the societal interest in preserving limited judicial resources, it is not so clear that judicial economy will necessarily follow from a transfer of these actions. Having carefully considered the factual and legal contentions which were set forth in the briefs and affidavits submitted by the parties and at the hearing on the preliminary injunction, this Court is familiar with the legal issues raised in the pending cross motions for summary judgment which soon will be ripe for final decision. Economy of judicial effort, in terms of the efficient resolution of both the overriding private concerns of the litigants and the interests of the general public, may well be best served by an orderly and expeditious disposition of the actions pending in this district.

While recognizing the possibility of inconsistent orders from different courts is a legitimate consideration under § 1404(a), the present posture of these actions together with the policy favoring the prompt adjudication of disputes—particularly those which bear importantly upon substantial interests of the public—convinces this Court that the administration of justice will be advanced by denying the motion to transfer.[14] As the Court earlier noted, most of the discovery connected with this litigation has been, or soon will be, completed, the parties have filed appropriate cross-motions for summary judgment with at least some of the requisite supporting briefs and affidavits,

14. *Cf.* Campbell v. Mitsubishi Aircraft International, Inc., 416 F. Supp. 1225 (W. D. Pa. 1976); Penn v. Goldman Sachs & Co., 397 F. Supp. 392 (S. D. N. Y. 1975); Nagle v. Pennsylvania R. R. Co., 89 F. Supp. 822 (N. D. Ohio 1950).

and the Court is prepared to deal expeditiously with the issues raised therein. Viewed from this perspective, the interest of justice is better served by a prompt resolution of dispositive legal issues raised in the motions or, if necessary, upon a trial on the merits. In short, the Court concludes that the Commission has failed to demonstrate that the convenience of the parties and witnesses, in the interest of justice, warrants a transfer of these actions to the District of Columbia.

An order will be entered denying the Commission's motion to transfer and will fix a schedule for the completion of briefing on the cross-motions for summary judgment.

Order.

For the reasons set forth in the Court's memorandum opinion entered on this date in this case, it is

ORDERED

1. The defendants' motion to transfer these actions to the District Court for the District of Columbia pursuant to 28 U. S. C. § 1404(a) is denied.

2. The following schedule for filing summary judgment motions and briefs and an argument date is hereby established which supersedes any prior orders:

(a) All motions for summary judgment by all parties together with accompanying main briefs and/or affidavits shall be filed (if not already filed) on or before *September 23, 1977.*

(b) All answering briefs and/or affidavits of all parties shall be filed on or before *October 7, 1977.*

(c) All reply briefs and/or affidavits of all parties shall be filed on or before *October 21, 1977.*

(d) Argument shall be held at *11:00 A.M., Friday, October 28, 1977.*

Dated: September 15, 1977.

/s/ JAMES L. LATCHUM
Chief Judge.

Supreme Court, U. S.
FILED
DEC 16 1977
MICHAEL RODAK, JR., CLERK

No. 77-508

In the Supreme Court of the United States

OCTOBER TERM, 1977

GTE SYLVANIA, INCORPORATED, ET AL., PETITIONERS

v.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 561 F. 2d 349; the opinion and order of the court of appeals denying rehearing (Pet. App. 71a-74a) are not yet reported. The opinion of the district court (Pet. App. 75a-86a) is reported at 400 F. Supp. 848.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1977, and petitions for rehearing were denied on August 25, 1977. The petition for a writ of certiorari was filed on October 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in directing the district court to adjudicate this case, which was brought by respondent Consumers Union to obtain disclosure, requested under the Freedom of Information Act, of certain documents within the custody of the Consumer Product Safety Commission, notwithstanding the facts that petitioners earlier had filed an action in the United States District Court for the District of Delaware seeking to enjoin the Commission from disclosing the documents and that that court had issued a preliminary injunction prohibiting disclosure pending disposition of that case.

STATEMENT

In June 1974, Consumers Union and other parties (hereinafter "the requesters") submitted to the Consumer Product Safety Commission a request under the Freedom of Information Act, 5 U.S.C. (and Supp. V) 552, for disclosure of certain documents concerning television accidents that petitioners (hereinafter "the manufacturers") had furnished to the Commission under claims of confidentiality (Pet. App. 3a-4a). In March 1975 the Commission concluded that the documents were not exempt from disclosure under the Act and that, even if they were not subject to mandatory disclosure, the Commission would exercise its discretion in favor of disclosing them (Pet. App. 5a).

After receiving notice of the Commission's decision, in April 1975 the manufacturers filed suits in the United States District Court in the District of Delaware, and in certain other federal district courts, seeking to enjoin disclosure (Pet. App. 5a-6a). Subsequently, all of the manufacturers' suits were consolidated in the District of Delaware. The court issued a preliminary injunction in October 1975 prohibiting disclosure of the documents pending a decision on the merits (Pet. App. 87a-126a).

The requesters did not seek to intervene in the Delaware proceeding. Instead, in May 1975 they filed this action against the Commission and the manufacturers in the United States District Court for the District of Columbia, seeking disclosure of the documents. The Commission and the manufacturers moved to dismiss on the ground that there was no case or controversy between the requesters and the Commission; in the alternative, the Commission and the manufacturers moved to stay further proceedings pending decision in the Delaware case (Pet. App. 75a-76a).

In September 1975, the court in the District of Columbia dismissed that action on the ground that, in view of the fact that both the requesters and the Commission favored disclosure of the documents, there was no case or controversy and the court therefore lacked jurisdiction (Pet. App. 75a-85a).

The court of appeals reversed (Pet. App. 1a-16a). The court first held that there was a case or controversy between the requesters and the Commission with respect to whether the Delaware proceeding prevented the District of Columbia court from adjudicating the case and ordering disclosure, and that that controversy sufficed to give the court jurisdiction (Pet. App. 9a-10a). Second, the court of appeals held that the Delaware proceeding did not prevent the District of Columbia district court from proceeding to the merits because the court of appeals believed that the Delaware proceeding had terminated, and also because the court doubted the vigor and sincerity with which the Commission opposed the manufacturers' suit in Delaware (Pet. App. 13a-15a). The court therefore remanded to the district court with instructions to adjudicate the merits of the requesters' suit (Pet. App. 15a-16a).

The Commission and the manufacturers petitioned for rehearing on the ground that the court misunderstood the status of the Delaware proceeding. They pointed out that the proceeding had not been terminated but had only been postponed pending a decision on one of the legal issues in a case in another district. During that postponement the Delaware court had removed the case from its "open docket" but had made clear that that action was not a disposition of the matter. They also pointed out that the Delaware proceeding was in fact scheduled for trial on the merits on September 12, 1977 (Pet. App. 17a-66a). On August 25, 1977, the court of appeals denied the petitions for rehearing on the ground that "[s]ince all necessary parties are before the District Court here, there appears no reason why the litigation should not proceed here, particularly since this is the venue authorized by the FOIA" (Pet. App. 72a).

After the court of appeals' original decision but before its denial of the petitions for rehearing, the Commission asked the Delaware district court to transfer that proceeding to the District of Columbia district court. On September 15, 1977, the Delaware court denied that motion (Pet. App. 128a-137a) on the ground, *inter alia*, that the Delaware proceeding had generated a voluminous record and was substantially advanced, while "nothing towards the disposition of the merits has been accomplished in the D. C. litigation" (Pet. App. 132a).

On December 8, 1977, the Delaware district court entered a final decision on the merits permanently enjoining the Commission from disclosing the documents.[1]

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[1]We are lodging copies of the judgment and the opinion entered by the court with the Clerk of this Court.

ARGUMENT

Review of the decision below is unwarranted at this time.

1. Although we argued to the contrary in the courts below, further reflection has persuaded us that a case or controversy, within the meaning of Article III, exists between the requesters and the Commission. The requesters seek "a declaration that the requested documents * * * must be made immediately available * * * for inspection and/or copying; and * * * an injunction enjoining the [Commission] and its agents and employees from failing to make the requested documents immediately available" (Pet. App. 75a). The Commission throughout has taken the position that such relief cannot be granted so long as the preliminary (and now permanent) injunction issued by the Delaware court bars disclosure. In other words, the requesters and the Commission do not agree as to the appropriate disposition of this action in the district court and accordingly do not "desire precisely the same result." *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 48. Because of this, there was no constitutional impediment to jurisdiction in the district court.

We question, however, whether the district court below is empowered to order disclosure so long as the Delaware injunction remains in force. Under the Act, the district court "has jurisdiction * * * to order the production of any agency records [that are being] improperly withheld." 5 U.S.C. (Supp. V) 552(a)(4)(B). An agency's withholding of documents pursuant to court order is not improper. Thus there appears to have been a sufficient statutory basis for the district court's dismissal of the requesters' complaint. That issue was not fully presented to or decided by the court of appeals, however, and it therefore does not warrant review by this Court.

2. We agree with petitioners that the court of appeals erred in directing the district court to proceed expeditiously to adjudicate the merits notwithstanding the pendency of the proceeding in Delaware and the outstanding preliminary injunction issued by the Delaware court. It is well established that a federal district court, in the interests of comity and judicial economy, should refrain from duplicating or interfering with the proceedings and orders of another federal district court with prior jurisdiction over the subject matter. See *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817; *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183; *Hilton Hotels Corp.* v. *Weaver*, 325 F. 2d 1010 (C.A.D.C.), certiorari denied, 376 U.S. 951. Adjudication of the requesters' suit by the district court below would duplicate the efforts of the district court in Delaware. Moreover, a final judgment by the District of Columbia court may conflict with the final judgment and permanent injunction recently entered by the Delaware court and thus may subject the Commission to conflicting orders. There appears no reason in this case to depart from the general rule of comity,[2] and we submit the court of appeals erred in doing so.

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[2]While there are factors favoring the District of Columbia as the appropriate forum for this controversy (in particular, the presence of the requesters as parties), there are also factors strongly favoring Delaware, which the Delaware court found controlling when it denied the Commission's motion to transfer, including prior jurisdiction in that court and the advanced stage of the litigation there. Now that the court has entered a final judgment and permanent injunction, principles of comity should in our view preclude the District of Columbia court from proceeding with this litigation.

There is no basis for the court of appeals' suggestion that the Commission has not vigorously or sincerely espoused its position in the Delaware proceeding. At the outset of that litigation the

3. At present, however, it is not apparent whether any substantial duplication of effort or conflict will in fact occur. First, we believe that the district court in the District of Columbia now has the power to suspend its proceeding in view of the final disposition of the action in Delaware. Although the opinion of the court of appeals denying rehearing appears to direct the district court to proceed expeditiously with the litigation (Pet. App. 72a-73a), the subsequent final decision by the Delaware court constitutes a change in circumstances that would permit, if not require, the District of Columbia court to stay its hand. That decision, however, is one for the district court in the first instance. Accordingly, since there is no assurance that the decision below will subject the Commission to conflicting orders or result in an unwarranted duplication of judicial effort, review of the matter by this Court at this time is unwarranted. Should the Commission find itself actually subject to inconsistent judgments or decrees and not be able to obtain relief from appellate courts, then at that time review by this Court may become appropriate.

Commission consented to the issuance of temporary restraining orders, but it vigorously opposed the preliminary injunction sought by the manufacturers and has continued to oppose the manufacturers' claim on the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

DECEMBER 1977.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-508

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONAUTIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION,

Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN,

Respondents.

MEMORANDUM OF THE RESPONDENTS CONSUMERS UNION OF THE UNITED STATES, INC. AND PUBLIC CITIZEN'S HEALTH RESEARCH GROUP IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals (1a-16a) is now reported at 561 F.2d 349.[1] The orders denying rehearing and rehearing *en banc* (71a-74a) are not officially reported.

[1] References to the Appendix filed with the Petition are designated "a."

QUESTION PRESENTED

Did the Court of Appeals correctly determine that a "case or controversy" existed under Article III of the Constitution in this Freedom of Information Act case in which all of the interested parties were before the United States District Court for the District of Columbia, and only that Court, and that there was no basis under the facts of this case for the District Court to delay proceeding to the merits of this controversy?

STATEMENT OF THE CASE

In this action under the Freedom of Information Act, as amended, 5 U.S.C. § 552 ("FOIA"), plaintiffs-respondents Consumers Union of the United States, Inc. and Public Citizen's Health Research Group (hereinafter "plaintiffs"/"requesters") seek access to reports on television accidents which are in the possession of the respondents Consumer Product Safety Commission and its members (referred to jointly as "CPSC"). Those reports were submitted to the CPSC by twelve manufacturers of television sets who are the petitioners in this Court and who were joined with the CPSC as defendants in this action (the "manufacturers").

The genesis of this case was a May 1974 order issued by the CPSC to the manufacturers requesting that they submit all accident reports collected by them since the National Commission on Product Safety held certain hearings in 1969. The CPSC also invited the manufacturers to indicate their views as to whether any of the submitted reports were entitled to exemption from disclosure under the FOIA. In June 1974, the requesters sought access under the FOIA to the documents submitted by the manufacturers in response to the CPSC's order. With the exception of a few reports

from manufacturers who did not seek confidentiality, the CPSC initially denied the request, but directed the manufacturers to substantiate their claims of confidentiality, Subsequently, plaintiffs' request was narrowed to exclude entirely documents protected by the attorney-client privilege or the work product doctrine, as well as those portions of documents containing the names and addresses of accident victims.

In October 1974, when no final determination had yet been made, requesters informed the CPSC that any further delay would be considered a denial of their request under the FOIA. As a result, representatives of the requesters and the CPSC met and agreed upon a timetable for the CPSC's review of the submissions, with a scheduled completion date of mid-March 1975.

On March 28, 1975, the CPSC issued its determination that the documents requested did not fall within any of the FOIA exemptions, but that even if some of them were exempt, it would exercise its discretion to disclose those documents in view of the important public health and safety interest in the information. The CPSC notified the manufacturers of this decision and advised them that it would withhold disclosure only until May 1, 1975.

In response to that notice, seven separate actions were filed by manufacturers against the CPSC in the United States District Court for the District of Delaware, each seeking an injunction prohibiting disclosure on the grounds that the release of the documents is barred by the exemptions to the FOIA, 5 U.S.C. §§ 552(b)(3) and (4), and by certain provisions of the Consumer Product Safety Act, 15 U.S.C. § 2055. Similar actions were filed by five other manufacturers in the United States District Courts for the Southern District of New York, Northern District of New York, and the Western District of Pennsylvania.

In each of these actions, all of which were commenced prior to May 1, temporary restraining orders were sought to prevent the release of the documents pending a determination of a motion for a preliminary injunction. After the CPSC consented to a temporary restraining order in most of the cases, and after such orders were granted without CPSC opposition in the others, the instant action was filed on May 5, 1975, in the United States District Court for the District of Columbia, naming both the CPSC and the twelve manufacturers who had brought suit as defendants.

Thereafter, all of the actions brought by the manufacturers were consolidated in the District of Delaware (the State of incorporation for each of the manufacturers), although none of them had their principal place of business there. Without objection from the CPSC, the temporary restraining orders were continued in effect until July 23rd, when oral argument was held on the motions for preliminary injunctions, and then until October 23, 1975, when the Delaware District Court granted the motions of the manufacturers for a preliminary injunction. Although all the parties in the Delaware cases were parties to the District of Columbia action, neither the manufacturers nor the CPSC sought to join the requesters as parties in Delaware under Rule 19, nor did the complaints allege any reason for non-joinder, nor was any attempt made under 28 U.S.C. § 1404(a) to transfer those cases to a forum where the requesters could readily be joined. Moreover, even though the submissions by the CPSC in Delaware plainly put that Court on notice of the interest of the requesters in the release of the documents,[2]

[2] *See GTE Sylvania, Inc. v. Consumer Product Safety Comm.*, 404 F. Supp. 352, 369 n.73 (D. Del. 1975).

that Court did not on its own motion inquire about the necessity of joining the requesters under Rule 19.

Meanwhile, in the action in the District of Columbia, the defendants – both the CPSC and the manufacturers – moved to dismiss on the ground that no case or controversy existed between the requesters and the CPSC, or in the alternative to stay all proceedings there pending a decision in Delaware. Their position was that since the manufacturers had won the race to the courthouse, and since the CPSC agreed with the requesters on the legal issues regarding the absence of an available FOIA exemption, the requesters should be required to rely on the allegedly adequate representation of their interests by the CPSC in Delaware. Moreover, they argued, there was insufficient adversity between the CPSC and the requesters to sustain the Article III requirement of a case or controversy. The District Court agreed, and on September 11, 1975, filed an opinion and entered an order dismissing the action for lack of a "case or controversy" between the requesters and the CPSC, and for absence of an independent cause of action and independent basis of subject matter jurisdiction between the requesters and the manufacturers. (75a-86a).

On appeal, a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit reversed and remanded the case for proceedings on the merits of plaintiffs' FOIA complaint. The Court first reviewed the facts as they existed at the time of the District Court's decision, and noted that, subsequently, a preliminary injunction had been granted, the CPSC had filed a notice of appeal which it then withdrew, and the Delaware Court had apparently "closed out" the actions there by an August 20, 1976 order. (7a-8a). More importantly, the Court found that

> despite full awareness of appellants' requests for access to the documents, neither the manufacturers nor the Commission even attempted to include appellants as parties or to transfer the cases to the District of Columbia where appellants could readily be joined. Furthermore, though the submissions by the Commission in Delaware plainly put that court on notice of the interest of appellants in release of the documents, the Court did not on its own motion inquire about the necessity of joining appellants under Rule 19, Fed. R. Civ. P. (7a).

The opinion then analyzed the decision in the trial court and found that the "substantial and extensively argued disagreement among the parties to this action fully satisfies the Article III case or controversy requirement." (9a). After examining the course of the litigation in Delaware in light of the Article III requirements, it concluded on the basis of the record that "we cannot believe that the Commission and the appellants lack the degree of adverseness necessary under the Constitution." (11a).

As to the question of whether the action should proceed in the District of Columbia or be stayed pending the outcome in Delaware, the Court observed that the preliminary injunction alone "could not bar the FOIA action instituted by appellants in the District of Columbia." (13a). Although recognizing that the injunction would "weigh heavily" in deciding which suit ought to proceed (*id.*), the Court of Appeals noted that there had been no appeal taken from the entry of the preliminary injunction and no action taken to make the injunction permanent during the succeeding interval of almost two years time. It found these factors to be

strong reasons in support of permitting the requesters to proceed with their action in the District of Columbia, a position the Court also supported with its observations that the CPSC was "less than vigilant in espousing its putative view that the requested documents should be disclosed" and that there was an "absence from the Delaware proceedings of any party requesting disclosure." (15a). Having thus analyzed all of the relevant circumstances, it directed that under the facts of this case, where there was a case or controversy in the District of Columbia and all of the interested parties were before that Court, the District Court should proceed to decide the merits and not await the result in Delaware.

Both the manufacturers and CPSC requested rehearing and suggested a rehearing *en banc*. They pointed out that the case in Delaware was "closed out" only "for statistical purposes" (48a-49a; 57a-58a). As if to underscore this point, immediately after the Court of Appeals issued its opinion in July 1977, the manufacturers initiated proceedings designed to make the preliminary injunction permanent. (49a-50a; 59a). In connection with those revived proceedings, the CPSC for the first time moved to transfer the Delaware actions to the District of Columbia, a request that was denied in view of the more than two years that had elapsed since those actions had been consolidated in Delaware. On August 25, 1977, the petitions for rehearing were denied for reasons stated in a *per curiam* memorandum. (71a-73a). In it the Court pointed out the continued absence of the requesters from the Delaware litigation in spite of the requirements of Rule 19. It further observed that since all of the relevant parties were present in the District of Columbia, where venue was plainly proper under the FOIA, the action should proceed in that forum, particularly in view of the FOIA's mandate that all proceedings be expedited.

THE WRIT SHOULD BE DENIED

The decision of the Court of Appeals is plainly correct in its conclusion that the requirements of Article III of the Constitution have been met. This is a three-cornered dispute in which all three interested sets of parties are present in this action brought in the District of Columbia. This Court's statement as to the scope of Article III – that "the business of the Federal courts should be limited to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process"[3] – was certainly met by the very real conflict present among the parties to this lawsuit. The principal decisions relied upon by petitioners, *Moore v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 37 (1971), and *Muskrat v. United States*, 219 U.S. 346, 361-62 (1911), are readily distinguishable since in both of those cases the only parties to the lawsuits were in agreement as to their outcome, whereas the presence of the manufacturers in this instance insures the adverseness required to satisfy Article III. As the Court of Appeals recognized, the requesting parties want the documents and their inability to obtain them without a lawsuit is sufficient to meet the requirements of a constitutional case or controversy.

Petitioners suggest, however, that there is a potential conflict between the decision below and what is transpiring in Delaware. The short answer is that no present conflict exists, and it is by no means certain that there will ever be any since the Delaware Court may rule for the CPSC. More importantly, if there is a conflict, the District of Columbia, not Delaware, is the proper place to resolve it since all of the interested parties are present in the District of Columbia Court and only in that Court.

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[3] *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

As this Court has observed in a similar situation involving the non-joinder of parties, "[o]f course, since the outsider is not before the court, he cannot be bound by the judgment rendered." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968). And if the CPSC and the manufacturers complain of duplicative litigation, the answer was supplied by the Sixth Circuit in *Boles v. Greenville Housing Authority*, 468 F.2d 476, 479 (1972): "Any hardship suffered by the appellants is attributable to their own failure to bring [an interested person] into the case as a party."

That position is reinforced by the reasonableness of the conduct of the requesters in this instance. Although the CPSC's failure to provide a timely response to their request would have permitted the requesters to file suit early on – and thereby win what the manufacturers view as the all-important race to the courthouse – the requesters hoped to avoid unnecessary litigation by negotiating with the CPSC to obtain the release of the important health and safety data at issue. Once the CPSC ruled in their favor in March 1975, there was no basis for a lawsuit until the May 1st release date had been reached. Thereafter, while the requesters could have sought to intervene in the consolidated Delaware actions, it would have meant litigating in an inconvenient, and perhaps hostile forum, as well as surrendering their right to move to transfer under 28 U.S.C. § 1404(a). *See, e.g., Commonwealth Edison Co. v. Train*, 71 F.R.D. 391, 394 (N.D. Ill. 1976). By intervening in Delaware, plaintiffs would have also been forced to relinquish the liberal rights which the FOIA grants to requesting parties to bring suits in the forums of their choice. 5 U.S.C. § 552(a)(4). While the inconvenience of going to Delaware may not have been insurmountable in this case, the next action could easily

have been brought in California, making litigation impossible as a practical matter.[4]

Therefore, the requesters chose to bring their own lawsuit, but in doing so did what none of the other parties had thought to do: to insure the necessary joinder of all interested persons by naming the manufacturers, and not simply the CPSC, as parties defendant. Even after this action was brought in the District of Columbia, the CPSC failed to file motions in the Delaware proceedings under Rule 19 or under section 1404(a), nor did the Delaware court inquire about the non-joinder of the requesters there. Instead, the CPSC sought to deprive the requesters of their preferred forum by moving to dismiss the District of Columbia action with the intention of forcing the requesters to go to Delaware or abandon their claim. The Court of Appeals said only that the requesters can proceed to the merits in the District of Columbia, a ruling that presents no issue requiring review by this Court.

Apart from the government's failure to preserve the rights of the requesters as necessary parties, there are other facts which demonstrate conclusively that the interests of the requesters were not being adequately represented in Delaware by the CPSC. Once the preliminary injunction was granted in October 1975, the CPSC could have appealed that ruling, which was largely based on an interpretation of the applicable law, or it could have sought to obtain a final decision from which an appeal could be taken without being disadvantaged by any discretionary

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[4] In fact, in *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977), the requesting party was the Legal Aid Society of Alameda County, California, yet Westinghouse was able to force the Society to come to Virginia to protect its interests.

factors favoring the manufacturers. It chose to do neither. In fact, until the Court of Appeals issued its ruling in July 1977, almost 21 months after the entry of the preliminary injunction, the CPSC had done nothing to further its alleged desire to release the requested documents. This failure is particularly noteworthy in view of the fact that in September 1976, Congress amended exemption 3 of the Freedom of Information Act to substantially reduce the basis upon which an agency may rely on other statutes to withhold disclosure.[5] Despite that change, which went to the heart of the manufacturers' claims, the CPSC did absolutely nothing to move the Delaware actions ahead. In view of all of these circumstances and the fact that it has now been almost three and a half years since plaintiffs' information request was made, the Court of Appeals was surely not in error in ruling that plaintiffs had a right to go to court to obtain a determination of their claim and that the District of Columbia was a proper place to decide the questions presented.

Petitioners, however, urge this Court to review the decision of the Court of Appeals that this case should proceed to the merits rather than awaiting the outcome in Delaware. They do not suggest any uniquely important questions presented by that ruling, which we believe is correct, but which is, in any event, dependent on the facts of this particular case. As we have demonstrated above, the Court of Appeals acted well within its powers in directing that the action in the District of Columbia go forward since the requesting parties would not be bound by the Delaware action even if it proceeded to judgment first, *Provident Tradesmens Bank & Trust Co. v. Patterson, supra,* particu-

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[5] Government in the Sunshine Act, section 5(b), Pub. L. 94-409, 90 Stat. 1241.

larly since the parties in Delaware made no attempt to join the requesters there. While the manufacturers argue that these proceedings must nevertheless be stayed since theirs was the first suit filed, the "first to file" rule is only a general, not a universal requirement, and should not be given primacy in FOIA actions where the statute is particularly solicitous of the rights of requesting parties insofar as choice of forums and right to expedition is concerned. In any event, the ruling by the Court of Appeals on the issue of the appropriateness of proceeding to the merits of this action surely does not warrant plenary consideration by this Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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On December 8, 1977, after respondents Consumers Union and Public Citizen's Health Research Group ("the requesters") filed their initial memorandum in opposition to the petition for certiorari, the District Court in Delaware entered summary judgment permanently enjoining the Consumer Product Safety Commission from disclosing the television accident reports sought by the requesters in this Freedom of Information Act suit. Petitioners now suggest that the change of the Delaware court injunction from preliminary to permanent compels this Court to vacate the judgment of the Court of Appeals and to direct the dismissal of the requesters' suit

in the District of Columbia for reasons of comity. Petitioners' Supplemental Brief, 1-3. In short, petitioners seek to have this Court summarily foreclose the requesters' statutory right to bring this suit under the FOIA, based on the outcome of litigation in Delaware in which they never participated and were not parties, and in which no effort has ever been made to join them under Rule 19. Requesters submit that the Delaware court order does not affect the essential issues in this case, and that there is no basis for this Court to consider this case at this time.

First, petitioners ignore the real possibility that the Delaware injunction will be overturned on appeal, either on the merits or for failure to satisfy the requirements of Rule 19. Second, petitioners overlook the fact that because the requesters were not parties to the Delaware litigation, they cannot be bound by the results of that action. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968) ("Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered.") Thus, even if all appeals in the Delaware action were concluded, the requesters could not be barred from bringing their own suit either under principles of due process, *see Hanson v. Denckla*, 357 U.S. 235, 249-50, 254-55 (1958), or the doctrines of collateral estoppel and res judicata, *see Lockport v. Citizens for Community Action*, 430 U.S. 259, 263 n.7 (1977); *Robertson v. Department of Defense*, 402 F. Supp. 1342, 1346-47 (D.D.C. 1975); *Advisory Committee Note to Rule 19*, 39 F.R.D. 89.

Nor is this a case in which principles of comity require the District of Columbia courts to defer to the Delaware court, because "the concept of comity has no application in cases like the instant one in which the two pending suits involve different parties. . . ." *Great Northern Railway Co. v. National Railroad Adjustment Board*, 422 F.2d

1187, 1193 (7th Cir. 1970); *Robertson v. Department of Defense, supra*, at 1346. None of the authorities cited at page 6 of the Brief for the Federal Respondents in Opposition stand for the proposition that under considerations of comity a litigant may be required to rely on the outcome of proceedings in a distant forum to which it is not a party.

Moreover, as the Federal Respondents point out in their Brief in Opposition, p. 7, consideration by this Court at this time would be premature. The possibility that the Federal Respondents might some day be subjected to conflicting orders is merely speculative and, significantly, not one that is of any present concern to them. Finally, it is clear that a decision by this Court that the Delaware proceeding overrides the requesters' suit in the District of Columbia would be of great moment, not only for FOIA litigation, but for a broad range of cases, and should not be made summarily as petitioners suggest.

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